

**Bond University**

## **DOCTORAL THESIS**

**Sport, the Crown & the Common Law : an Appraisal of the Common Law Offence of Public Nuisance and the Human Activity of Sport, Embodying Assessment of the Responsibilities of the Executive Branch of Government in Managing the Circumstances in which Public Nuisances are Created and Assessment of the Need for Legislative Reform**

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## Sport, The Crown & The Common Law —

An appraisal of the common law offence of public nuisance and the human activity of sport, embodying assessment of the responsibilities of the Executive branch of government in managing the circumstances in which public nuisances are created and assessment of the need for legislative reform.

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## Abstract

When a family or a group of friends visit a beach or a park for their enjoyment and recreation and find that they are not able to use the beach or the park or are told to move off the beach or away from the park because a publicly exhibited sporting event is making use of this public space, a conflict of rights arises. The family or group of friends is not wrong in questioning the rights of a sports association to exclusive use of a public space for their public sporting event.

The thesis assesses whether the public possess rights at public places and whether these public rights are adequately safeguarded during public sporting events by reason of the development of the common law in public nuisance litigation. Common law public rights such as a public right to quietude, a public right to safety, and a public right to recreation are discussed. Courts may intervene to protect inferred common law public rights during public sporting events and may declare public sporting events unlawful. This thesis finds that common law public rights may not be impinged by the staging of public sporting events at public places. Only by means of reform of the law may common law rights be displaced and public sporting events be lawfully staged. Public sports are a special category of human activity that depend upon sanction from Parliament for legitimacy.

This thesis argues that law reform in the form of a sports code is warranted owing to the participation of the Executive in promoting public sport in breach of common law proscription of such promotion where it impinges upon public rights. Regulation in the sporting arena is not a modern legal development and this thesis describes examples of regulation from the year 1194 onwards. Each historical regulation can be viewed as attempts by the Executive to control excesses or breaches of the law in public exhibitions of sport.

Because publicly exhibited sporting events are liable to proscription as public nuisances, following the common law case law, and because the public's rights to use of public spaces may be carelessly inhibited, this thesis argues that legislative reform in the form of a Sports Code is warranted.

## Declaration

This thesis is submitted to Bond University in fulfilment of the requirements of the degree of Doctor of Philosophy. This thesis represents my own original work towards this research degree and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

25 November 2011

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#### A word on citation

This thesis uses a modified version of the *Oxford Standard Citation of Legal Authorities* (*Oxford Standard*). A modified version has been adopted because the content of this thesis has appeal to an audience wider than the legal community – namely, the sports industry, media, local government, parliamentarians, and politicians, in a wide variety of common law jurisdictions. The esoteric nature of citation in the *Oxford Standard* is believed to be detrimental to a full understanding of the arguments of this thesis by those persons who possess no legal training. Consequently, the following amendments of the *Oxford Standard* are utilized throughout this thesis:

Where the *Oxford Standard* recommends that only a number following the citation of a court report be used to denote the page at which judicial dicta are to be found, this thesis will use the phrase “at p” followed by the page number.

Where the *Oxford Standard* recommends that only a number within a square bracket following the neutral citation of a court report be used to denote the paragraph at which judicial dicta are to be found, this thesis will use the phrase “at para” followed by the paragraph number within a square bracket.

Where the *Oxford Standard* recommends that only an acronym be used to signify the court which made the decision in the case referenced, this thesis will use the full name of the court, where appropriate.



### Note

The central legal question raised in this thesis, namely, whether a publicly exhibited sporting event can impinge upon public rights, was initially brought to the mind of the author consequent to a personal experience of the author and the author's mother. The author competed in the Royal Windsor Triathlon at Windsor and Eton in England in June 2002. The running leg of this triathlon race followed a route along the road bordering Windsor Castle, down to the Thames and across the Thames down the Eton High Street to Eton College and returning. During the race the author's mother, who was spectating, and was stationed on the bridge over the Thames between Windsor and Eton, became involved in a heated argument with a local resident. The local resident was upset that she was unable to take her Sunday morning walk with her dog without being bumped by the participants in the triathlon race and by crowds of people spectating, or otherwise inconvenienced by the barriers that were erected by race officials to guide the competitors through the running leg of the course. She complained that both she and her dog had to duck and weave through the crowd of spectators and through athletes competing in the race to avoid being assaulted.

The complaint of the local resident left an indelible imprint on the mind of the author. The local resident had raised important questions about the lawfulness of the triathlon event staged at Windsor and the impact that this publicly exhibited sporting event had on her rights to use of the public highway for walking and for walking her dog.

# Chapter 1

## Introduction

Every day, all round the world, people are engaged in sports, physical exercise, and recreative pursuits. Some are professional athletes, earning a living from their athletic ability; some are amateur athletes dedicated to peak performance; and others are ordinary folk maintaining their health and enjoyment of life. Each of these persons, from the extraordinary superstar to the common people, make use of a wide variety of places and spaces, some privately owned, others publicly owned.

The health-conscious, as well as ordinary folk who enjoy recreative pursuits, have interest in preserving for their benefit public places and spaces where they can partake of physical exercise and practise sports and other pastimes. These people also have interest in ensuring that their peaceable lives are not disturbed arbitrarily. In addition to recreative pursuits, there exist sports organisations and sports promoters who stage sports events open to the amateur sports enthusiast. Further, there exists a sports industry whereby sports administrators, promoters, television corporations and advertisers, ply a lucrative trade staging sports events and exhibitions to the public. Their interest is principally pecuniary.

### 1. A Scenario

Imagine a scenario. Imagine a beach. It is a beautiful sunny Sunday morning. Not too hot; nor too cold. You and your family have had a very busy week meeting the demands of a modern-day lifestyle. Your past week was filled with work commitments, helping the children with their homework, ferrying children to and from tennis lessons, or swimming

training, band practise, ballet classes, and the like. Saturday was absorbed by supporting your children at a soccer match, followed by shopping for the week's groceries, cleaning the house, and hosting a barbeque for family and friends. Sunday finally arrives – a day to spend happily with your family. Owing to the beautiful weather, you decide on a trip to the beach. Your spouse and your children would love to relax on the beach and frolic in the water. You pack up towels, beach umbrellas, surfboards, boogie boards, buckets, and spades, into your car. After driving to the beach, you set yourself down on the beach, by the shore. You take the children for a swim in the surf and build sandcastles on the shoreline.

And then, all of a sudden, a man comes up to you and tells you to move. You and your family are told to get out of the water and move off the beach. Around you various people are erecting fences and barricades with Kellogg cereal advertisements attached to them. A VIP marquee is built on the beach. Television crews occupy the public beach and cameras start filming. And crowds descend upon you. It would appear, from all the goings on, that a surfing event, beach volleyball event, surf-lifesaving championship event, or beach cricket event sponsored by a major television network, is to be staged at the very spot where you are seated. You question what is happening and why it is happening. You wonder about *your* rights.

## 2. A Conflict

The desires of professional athletes and sports organisations, in plying their trade and in making profit from the public exhibition of sport, can come into conflict with individual members of the public peaceably going about their lives. This thesis argues that when a publicly exhibited sport event is staged, that event can impinge upon a number of public rights. These public rights arise from natural law jurisprudence and have been delimited, defined and elucidated by the courts in each common law jurisdiction. These public rights are common law rights that have been explained and refined over hundreds of years of judgments. These public rights are rights which the people generally possess by virtue of the common law declarations in public nuisance cases and by virtue of the judgments supporting those declarations. This thesis will detail and explain the nature of these public rights in

respect of their relationship to the human activity of sport through an assessment of the common law case law on public nuisance. Whilst there is no statutory provision which spells out and protects public rights of access to and use of public spaces for individual recreative pursuits, there exists, at common law at least, a means by which public rights may be protected from interference from activities which include publicly exhibited sport events. The common law offence of public nuisance is the only law of general application subsisting in our present legal system capable of staving the diminution of public rights within the sports context. In applying the common law offence of public nuisance to publicly exhibited sport events, the liberty to practice sport is defined.

### 3. Sport, the Crown and the common law: an overview

Very few publicly exhibited sporting activities are regulated by statute. Those that are include only horseracing, motorcar racing and boxing, and some major sporting events held at major sports stadia;<sup>1</sup> though not every common law jurisdiction has legislation to cover even these three sports. The reasons why only these sporting activities warrant legislative

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<sup>1</sup> See, eg, Boxing and Wrestling Control Act 1986 (NSW); the Racing Administration Act 1988 (NSW); the Racing Act 2002 (Qld); the Horse Racing Act, Revised Statutes of British Columbia 1996, c. 198; the New York Racing, Pari-Mutuel Wagering and Breeding Law c 47-A; the California Business and Professions Code, ss 18600-18618 and 19420-19421; Motor Racing Events Act 1990 (Qld); and Australian Grand Prix Act 1994 (Vic) are but a few examples of this regulation. Recent legislative enactments in the Australian states of New South Wales and Victoria establish a general set of rules for the management and conduct of sporting events that are declared to be “major sporting events”. But even these enactments are narrow in their scope. In respect of the New South Wales Major Events Act 2009, it is worth noting that only one publicly exhibited sporting event has been authorized under the Major Events Regulation 2010 in New South Wales – the Sydney International FIFA Fan Fest. Under the Victoria legislation, the Major Sporting Events Act 2009, the term “major sporting event” is defined pursuant to section 3 to include sporting events such as the Australian Tennis Open, the Australian Grand Prix, and the Australian Rules Football Grand Final, and analogous events. Further, the Victoria Act defines “sports event”, under section 3 of the Act, to mean;

- “(a) a type of match, game or other event; or
  - (b) a series of matches, games or other events; or
  - (c) a tournament,
- involving the playing of sport (whether or not for competition) at a ground or other place (whether indoors or outdoors) to which persons are admitted on payment of a fee or charge, or after making a donation, to view the playing of the sport or to enter or remain at the ground or place and, in the case of sports event that consists of a series of matches, games or other events or a tournament, includes any opening or closing ceremonies connected with the series or tournament.”

Excluded from this definition are sports events staged at public places such as beaches and parks and roads at which members of the public spectate without paying any fee to so do, including triathlon events, surfing events and surf lifesaving tournaments. The many public sporting events that take place at beaches and parks and on roads are not covered by the legislation.

regulation is chiefly historical,<sup>2</sup> and are intimately connected with the historical impact which these sports had on public culture in former ages.<sup>3</sup> The growth of new sports and the popularity of new forms of publicly exhibited sporting events, in modern times, highlight for us today, as the sports of horseracing and boxing did for our forebears in former ages, questions as to the lawfulness of such activities where they impact upon the public generally. Triathlons, Marathons, Cycling Criterions, are staged in public spaces such as parks, beaches and roads. Use of these same limited public spaces by members of the public who live in modern-lifestyle apartments with little or no personal outdoor space yields a potential conflict.

The common law offence of public nuisance may be seen as a useful, though perhaps not desirable or effective, legal framework by which we can define and delimit the manner in which publicly exhibited sports can be staged. One of the purposes of this thesis, in identifying the common law offence of public nuisance as a means for controlling the circumstances in which sporting events may be staged in public and as a means for declaring and upholding public rights which would otherwise be nullified if the staging of a public sporting event proceeded, is to underscore that publicly exhibited sporting events are at risk of proscription as public nuisances. The other purpose is to underscore that public rights may dissipate in modern civic life unless we consciously seek to balance the needs of all citizens. Television networks and advertising agencies invent new forms of sport, such as the Red Bull Air Race World Series<sup>4</sup> or Beach Cricket,<sup>5</sup> in order to enhance their individual

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<sup>2</sup> Sir William Holdsworth, eg, is of the view that the recreations and sports of various classes of society during the fifteenth and sixteenth centuries were matters of statutory intervention in the interests of the state. Rich and poor, high and low alike, must help the state – by the labour of their bodies if they could not help with their counsel or their wealth, he says. Holdsworth sees the statutes 12 Ric II c 6, 11 Hen IV c 4, and 17 Edw IV c 3 as encouraging the practising of archery alone was a policy initiative to train the public in the skills of archery so that they might be useful to the realm in the fighting of wars or in defending the realm. His reading of these statutes as ordering the people to leave playing at ‘hand ball or foot ball’ or ‘such other unthrifty games’, and to practice at bows and arrows on Sundays and other festival days: Sir William Holdsworth *A History of English Law* (4<sup>th</sup> edn Methuen & Co London 1936) vol 11, at p 446.

<sup>3</sup> See the statutes enacted in Hanoverian England such as 13 Geo 2 c. 19 (1740) [which prohibited certain types of horse racing]; 15 Geo 2 c. 19 (1742); and 18 Geo 2 c. 34 (1745) [concerning prohibitions on species of horse racing, and entitled, ‘An Act to explain amend and make more effectual the laws in being to prevent excessive and deceitful gaming and to restrain and prevent the excessive increase of horse races’].

<sup>4</sup> <<http://www.redbullairrace.com>> (1 May 2008). The Red Bull Air Race World Series is staged in cities around the world, such as Perth, Western Australia, and makes use of public parks for the seating of spectators: see <<http://www.westernaustralia.com/RedBullAirRace>> (19 May 2008).

<sup>5</sup> <<http://www.xxxxgoldbeachcricket.com.au/Default.aspx>> (1 May 2008). Beach Cricket is a promotional activity which uses the public beaches of Australia to stage a cricket match between two teams of retired

profile. It is not suggested in this thesis that such innovative public or cultural activities should not take place. Rather, what is here contended is that these publicly exhibited sports events ought to be staged lawfully in accordance with the common law, or in accordance with a proposed legislative regime, and ought to be subject to a rigorous assessment with the aim of achieving a balance between competing rights of use of public spaces. This assessment task is entrusted, by virtue of our common law and constitutional heritage, to the Crown and the courts, until such time as Parliament will intervene to provide a comprehensive legislative scheme.

The means by which the common law might apply to sport may be perceived as amorphous. But in applying the common law offence of public nuisance to the human activity of sport, the courts are not refashioning common law principles. The task is not didactic or sententious. The task is merely analytical. The common law offence of public nuisance operates, as many common law offences do, through the application of a broad legal principle to a very wide variety of factual situations.<sup>6</sup> Sporting events are no exception to the operation of the common law offence of public nuisance. Where a sporting event creates obstruction,<sup>7</sup> annoyance or discomfort to the public,<sup>8</sup> endangers the life, or health of the public,<sup>9</sup> it may be proscribed as a public nuisance. The type of sport event does not of itself

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professional cricket players on the beach. It is sponsored by a beer company and a television company of Australia.

<sup>6</sup> In his critical assessment of the common law offence of public nuisance, Spencer writes: “Why is making obscene telephone calls like laying manure in the street? Answer: in the same way as importing Irish cattle is like building a thatched house in the borough of Blandford Forum; and as digging up the wall of a church is like helping a homicidal maniac to escape from Broadmoor; and as operating a joint-stock company without a royal charter is like being a common cold; and as keeping a tiger in a pen adjoining the highway is like depositing a mutilated corpse on a doorstep; and as selling unsound meat is like embezzling public funds... All are, or at some time have been said to be, a common (alias public) nuisance.” JR Spencer ‘Public Nuisance – A Critical Examination’ (1989) 48 CLJ 55, at p 55. For a detailed exposition on the law of nuisance generally, see FH Newark ‘The Boundaries of Nuisance’ (1949) 65 LQR 480.

<sup>7</sup> See eg *Shaw’s Jewelry Shop Inc v New York Herald Co* 170 AD 504, 156 NYS 651 (NY App Div 1915), aff’d 224 NY 731, 121 NE 890 (1918); *R v Moore* (1832) 3 B & Ald 184; *R v Cross* (1812) 3 Camp 244. See further discussion in Part 2 of this thesis.

<sup>8</sup> See eg *Hoover v Durkee* 212 AD 2d 839, (1995) at p 840; see *State of New York v Waterloo Stock Car Raceway* 96 Misc 2d 350, 409 NYS 2d 40 (1978); *State of New York v Bridgehampton Road Races Corp* 54 AD 2d 929, 388 NYS 2d 131 (1976); *Bedminster Township v Vargo Dragway Inc* 434 Pa 100 (1969); *Jones v Queen City Speedways Inc* 276 NC 231, 172 SE 2d 42 (1970); *Laing v St Thomas Dragway* [2005] OJ No 25, 2005 ACWSJ 1385, [2005] 136 ACWS(3d) 776 (Ontario Superior Court of Justice); *Stretch v Romford Football Club Ltd* [1971] EGD 763; *Gilmour v Green Village Fire Department Inc* 2 NJ Super 393, 63 A 2d 918 (1949); *Bellamy v Wells* (1890) 60 LJ Rep Ch NS 156. See further discussion in Part 2 of this thesis.

<sup>9</sup> See eg *Aldridge v Van Patter* [1952] OR 595, [1952] 4 DLR 93, [1952] OWRN 516 (Ontario High Court); *State ex rel Attorney General v Canty* 207 Mo 439 (1907). An assessment of the possible impact of the common law

determine whether the sport event may be proscribed as a public nuisance. The only question to ask is whether the sport event has created an obstruction or an annoyance or discomfort to the public. Various sports have been held to be public nuisances when conducted at certain places and in a certain manner: clay pigeon and pigeon shooting was held to be a public nuisance in *R v Moore*.<sup>10</sup> A roller skating rink was held to be a public nuisance in *Newell v Izgard*.<sup>11</sup> In *Dewar v City and Suburban Race Course Co*,<sup>12</sup> horseraces held on Sundays were held to be a nuisance. The holding of a regatta was held to be a nuisance in *Bostock v North Staffordshire R Co*.<sup>13</sup> Public boxing has been held to be a public nuisance in several cases. An indictment for a public nuisance by keeping a house for public boxing and cockfighting was adjudged good by the King's Bench in *R v Higginson*.<sup>14</sup> Public boxing matches were held to be a nuisance, and injunctions were granted, in *Bellamy v Wells*,<sup>15</sup> in *The Columbian Athletic Club v State, ex rel McMahan*,<sup>16</sup> and in *Commonwealth v McGovern*.<sup>17</sup> The tee and golf hole on a golf course was held to be a public nuisance in *Castle v St Augustine's Links Limited*.<sup>18</sup> And in *Johnson v City of New York*,<sup>19</sup> the Court of Appeals of New York held that a motorcar race about the streets of New York was a public nuisance in the circumstances of the case. A sports event may be public nuisances when conducted too often,<sup>20</sup> when conducted at certain times or days,<sup>21</sup> or when conducted at certain places.<sup>22</sup>

What is also observable through the appraisal of the common law case law, in this thesis, is that sports, and particularly public sports, are inclined to generate public nuisances given the content and the manner of their exhibition.

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offence of public nuisance on the sport of boxing, which medical research has now confirmed is dangerous to health, rather than being of benefit to health, and other sports such as pseudo combat-warfare, is discussed further, in Part 2 of this thesis.

<sup>10</sup> (1832) 3 B & Ald 184 (King's Bench).

<sup>11</sup> [1944] 3 DLR 118 (New Brunswick Supreme Court) at p 123.

<sup>12</sup> [1899] 1 IR 345.

<sup>13</sup> (1852) 5 De G & Sm 584, (1852) 64 ER 1253.

<sup>14</sup> (1762) 2 Burr 1232.

<sup>15</sup> (1890) 60 LJ Rep Ch NS 156.

<sup>16</sup> 143 Ind 98, 40 NE 914 (1895).

<sup>17</sup> 116 Ky 212, 75 SW 261 (1903).

<sup>18</sup> (1922) 38 TLR 615.

<sup>19</sup> 186 NY 139, 78 NE 715, (1906).

<sup>20</sup> See eg *Bellamy v Wells* (1890) 60 LJ Rep Ch NS 156.

<sup>21</sup> See eg *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, 136 ACWS(3d) 776; *Dewar v City and Suburban Race Course Co* [1899] 1 IR 345; *Bellamy v Wells* (1890) 60 LJ Rep Ch NS 156.

<sup>22</sup> See eg *Johnson v City of New York* 186 NY 139, 78 NE 715 (1906); *Attorney-General v Blackpool Corporation* (1907) 71 JP 478; *Newell v Izgard* [1944] 3 DLR 118 (New Brunswick Supreme Court); *Bostock v North Staffordshire R Co* (1852) 5 De G & Sm 584, (1852) 64 ER 1253.

In applying the principles of public nuisance to the human activity of sport, two interrelated tasks are undertaken. On the one hand, a judge will determine whether a publicly exhibited sport can be lawfully staged at the place, and time, and in the manner proposed. A judge will thus define the extent of the rights of the professional athlete and sports organisation to make use of private spaces or public spaces to ply their trade. On the other hand, a judge will determine the existence of a public right, such as a public right to quietude or a public right to use of public places for recreation. In order to find a public nuisance a judge must determine that a public right exists, which public right has been impinged upon by the staging of the publicly exhibited sport event. The consequence of this doubled deliberation is that a publicly exhibited sport could be declared to be unlawful as being a common law offence known as a public nuisance where it impinges public rights. Such exhibitions would then be abated.

That the common law offence of public nuisance remains a pertinent, efficacious and utilitarian remedy was opined recently by appellate courts in the United Kingdom and the United States.<sup>23</sup> Many public sporting events now take place at night, sometimes even of a Sunday night, although this was not formerly the case. Occasionally these games involve riotous, violent, or bacchanalian behaviour on the part of spectators.<sup>24</sup> In many countries publicly exhibited sports events do attract violent crowds. Why such games take place at

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<sup>23</sup> *R v Rimmington*, *R v Goldstein* [2005] UKHL 63 at paras [10] and [36] (Lord Bingham of Cornhill) and para [45] (Lord Roger of Earlsferry), [2006] 1 AC 459, [2005] 3 WLR 982; *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91, 761 NYS 2d 192 (2003), at p 97 of the former report; and *Wheeler v Lebanon Valley Racing Corp* 303 AD 2d 791, 755 NYS 2d 763 (2003).

<sup>24</sup> There are, literally, hundreds of stories of riots and public violence at publicly exhibited sport events. Consider such football events as that on Sunday evening, 17<sup>th</sup> April, 2005, eg, between the soccer clubs South Melbourne, which draws support largely from Melbourne's Greek community, and Preston, almost exclusively backed by the Macedonian community. Tensions exist between the two tribal teams, exacerbated by the disparate ethnicity of the supporter base. Some 100 to 400 spectators invaded the pitch, and flares, darts and bottles were thrown onto the pitch. Some 50 police officers were required to quell the riot. No arrests were made, the police fearing that they would lose their personnel to the violence. See B Packham P Desira and H Lloyd-McDonald 'Football Clubs Face Expulsion' *Herald Sun* Fox Sports <<http://foxsports.news.com.au/story/0,8659,15016210-23215,00.html>> (20 April 2005); and — 'Clubs Face Expulsion After Melbourne Soccer Riot' *ABC Sport* Australian Broadcasting Corporation <<http://www.abc.net.au/sport/content/200504/s1347485.htm>> (20 April 2005). Similar scenes occurred when fans of the Croatian-backed football team Sydney United battled Serbian supporters of the rival White Eagles in suburban Sydney — 'Soccer Riot Enquiry' *ABC National Radio* Australian Broadcasting Corporation <<http://www.abc.net.au/rn/talks/brkfast/stories/s1325386.htm>> (20 April 2005); — 'Crowd Violence Will Not Be Tolerated: O'Neill' *ABC Sport* Australian Broadcasting Corporation <<http://www.abc.net.au/sport/content/200504/s1348805.htm>> (20 April 2005).



night, when alcohol consumption is likely to be considerable, and when the management of the sport invariably knows that trouble might arise between the opposing fans of the teams participating in the event, rather than at a more genteel time such as of a Saturday afternoon or Saturday morning, for example, is a germane query.<sup>25</sup> Considering that sporting events comprise of increasing levels of noise, music, and drunken revelry, occurring at night, it is reasonable to question whether the holding of sporting events at night, irrespective of any commercial value which might be considered relevant to the sporting association conducting the sport in terms of television broadcast revenue, creates untoward annoyance or disturbance to the public, or endangers the safety of the public, thus amounting to a public nuisance at common law.<sup>26</sup> This thesis seeks to challenge assumptions and to highlight the disadvantages of laissez-faire policy in the context of public sport events.

The Executive of government has a pivotal role to play, subject to any legal reform by Parliament, in ensuring that the exigencies of public sport events do not impact unfairly on the communities that the Executive represents. In relation to any violent or riotous acts at football games in the future, the Executive, in this instance characterized by the Attorney-General, may well have success in obtaining an injunction against a Football Federation, for

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<sup>25</sup> It may be that the holding of occasional sporting events of a night time does not amount to a public nuisance; yet the holding of events on weeknights, or on a Sunday night, might amount to a public nuisance in particular circumstances. This is, in effect, the decision in *Bellamy v Wells* (1890) 60 LJ Rep Ch NS 156. In this case Justice Romer enjoined a boxing club proprietor from carrying on boxing matches at his premises in London so as to cause a nuisance to the plaintiffs, including any crowd caused to be assembled by the boxing contests held in the club premises. The complaint of nuisance in the case rested not on the fact of noise generated from inside the club, but by noise generated outside the club by patrons coming to and going from the club. These patrons made great noise by “cheering, hooting, and whistling, especially when the combatants and their friends arrive at or leave the club, and when the result of the contest is announced, and during the time that the police are endeavouring to cause the crowd to move on or disperse.” (p 161). The boxing contests at the club were held “from time to time in the season between October and August, in the basement of the club premises, generally about midnight or later.” (pp 160-161). The plaintiffs’ witnesses gave evidence that the time at which the sports events were conducted, and at which times the crowds of patrons conducted themselves noisily, prevented them from sleep until a late hour in the morning. Justice Romer, in giving judgment for the plaintiffs stated, at p 162: “...unless the defendants be restrained by injunction, the occasions of nuisance I have referred to will probably be repeated, for the arrangements of the club are that these special [boxing] contests shall take place at least four times in the course of each season,... Under these circumstances, and having regard to the serious nature of the nuisance,... being one taking place and preventing sleep on the part of those suffering from it for some time before and for some hours after midnight, I have come to the conclusion that the plaintiffs are entitled to an injunction... for it certainly cannot in my judgment be successfully contended by the defendant that, in holding these contests and so collecting noisy crowds at the late hour he does, he is using the club premises in an ordinary way or is not materially interfering with the ordinary comfort of existence of the occupiers of No. 33 Gerrard Street...”

<sup>26</sup> For discussion on the definition of public nuisance see Part 1, below.

example, thereby preventing the playing of a game at night and mandating that such game take place at another time, perhaps of a Saturday morning, for example, if at all.<sup>27</sup>

All personal activity must yield in some degree to the collective right in every civilized community. Recently, the Supreme Court of Illinois, in disposing of a public nuisance suit, adopted the comments of Horace Wood in *A Practical Treatise on the Law of Nuisances*, stating that public nuisance encompasses:

“that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, real or personal, or from his own improper, indecent or unlawful personal conduct, working an obstruction of, or injury to, a right of another or of the public... It is a part of the great social compact to which every person is a party, a fundamental and essential principle in every civilized community, that every person yields a portion of his right of absolute dominion....”<sup>28</sup>

#### 4. The structure of this thesis

Following discussion of the historical regulation of sport activity from the middle ages and onwards, in Chapter 2 of this thesis, the assessment of the common law offence of public nuisance and its application to the human activity of sport proceeds in four distinct and linked parts.

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<sup>27</sup> Note that a further subsequent game between the Sydney teams Sydney United, drawing its support from the Croatian community and Bonnyrigg, drawing support from the Serbian community, resulted in further violence amongst fans after the football game, albeit that the game was played on a Saturday afternoon at a neutral sports ground, the Parramatta Stadium, and that there was no violence in the football grandstand itself. See, — ‘Sydney Soccer Fans Arrested After Clash’ *ABC Sport* Australian Broadcasting Corporation <<http://www.abc.net.au/sport/content/200504/s1357033.htm>> (1 May 2005); V Devai ‘Violent Fans Deserve Life Bans’ *AAP Fox Sports* <<http://foxsports.news.com.au/story/0,8659,15144055-23215,00.html>> (1 May 2005); P Badel ‘Another Day of Shame in Sydney’ *The Sunday Telegraph* Fox Sports <<http://foxsports.news.com.au/story/0,8659,15138157-23215,00.html>> (1 May 2005).

<sup>28</sup> *City of Chicago v Beretta USA Corporation*, 213 Ill 2d 351 (2004) at p 365, citing HG Wood *A Practical Treatise on the Law of Nuisances* (3<sup>rd</sup> edn Bancroft-Whitney San Francisco 1893) at s 1 at p 1-3.

The first part of this thesis looks at the nature of those public rights which may be impinged upon by the staging of publicly exhibited sport events, such as a public right to quietude,<sup>29</sup> and argues the existence of a public right to use of public spaces for personal recreation. The existence of a public right to use of public spaces for personal recreation rests on jurisprudential opinion that sport is a natural right.

The second part of this thesis reviews the law of public nuisance. This is an important task as there is little critical analysis of the common law offence of public nuisance (there being only three meritorious articles in the past 50 years)<sup>30</sup> and a review has not been conducted since Spencer's salient appraisal of public nuisance more than twenty years ago.<sup>31</sup> There are no analyses of the relationship between the common law offence of public nuisance and sport. The recent definitive judgment of the United Kingdom House of Lords on public nuisance in *R v Rimmington*,<sup>32</sup> and the recent decisions of the Supreme Court of Illinois<sup>33</sup> and of the Court of Appeals of New York,<sup>34</sup> each dealing with appeals on public nuisance suits, highlights the need for an updated critique. The first part of this thesis assesses the definition of public nuisance; the remedies available against a public nuisance; the constitutional importance of *ex officio* and relator actions in public nuisance and the role of the Executive in such suits; whether the offence is ill-defined, incapable of application to the human activity of sport; and last, the question as to the modern relevance of the offence of public nuisance and the utility of public nuisance

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<sup>29</sup> See eg *Devar v City and Suburban Race Course Co* [1899] 1 IR 345.

<sup>30</sup> The three articles to receive judicial comment in recent years are: (1) JR Spencer 'Public Nuisance – A Critical Examination' (1989) 48 CLJ 55, cited in *R v Rimmington*, *R v Goldstein* [2005] UKHL 63, [2006] 1 AC 459, [2005] 3 WLR 982, at para [6]; *Goldstein v R*, *R v R* [2003] EWCA Crim 3450 at para [10], [2004] 1 WLR 2878 at p 2882; (2) J Cassels 'Prostitution and Public Nuisance: Desperate Measures and the Limits of Civil Adjudication' (1985) 63 Can Bar Rev 764, cited *Attorney-General of Ontario v Dieleman* [1994] 20 OR (3d) 229 at p 269; and (3) Developments 'The Paths of Civil Litigation: The Use of the Public Nuisance Tort Against the Handgun Industry' (2000) 113 Harv L Rev 1759, cited in *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91, 761 NYS 2d 192 (2003) at p 109 (Rosenberger J.). The only other article which touches on the crime of public nuisance receiving recent judicial comment is an article from 1949 by Professor Newark: FH Newark 'The Boundaries of Nuisance' (1949) 65 LQR 480, cited eg in *Brodie v Singleton Shire Council* [2001] HCA 29 at para [121]; *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1.

<sup>31</sup> JR Spencer 'Public Nuisance – A Critical Examination' (1989) 48 CLJ 55.

<sup>32</sup> [2005] UKHL 63, [2006] 1 AC 459, [2005] 3 WLR 982.

<sup>33</sup> *City of Chicago v Beretta USA Corporation* 213 Ill 2d 351, 821 NE 2d 1099 (2004).

<sup>34</sup> *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91, 761 NYS 2d 192 (2003); *Wheeler v Lebanon Valley Racing Corp* 303 AD 2d 791, 755 NYS 2d 763 (2003).

Part Three of this thesis sets out the many ways in which sport events have been held in numerous common law jurisdictions to be public nuisances. This comprises of a survey of the caselaw wherein common law public nuisance has been applied to sport events. Precedent demonstrates that publicly exhibited sport events create obstruction and inconvenience to the public in the exercise of a public right of way, endangerment to public safety, discomfort and inconvenience to the public exercising a public right of quietude, and endangerment to public health. This survey is designed to highlight the fact that publicly exhibited sport events *can* impact adversely on the public and *can* impinge upon public rights. A concomitant aspect of the survey in Part Three is to discredit false assumptions which might exist respecting the lawfulness of all publicly exhibited sports.

In Part Four, the thesis assesses the limits of governmental authority to promote or to license publicly exhibited sport events. This thesis argues that the Executive of government – the Crown – has a primary role to play in the management of publicly exhibited sporting events, consistent with that exercised in the middle ages, and that legislative reform is necessary to provide a comprehensive and improved means for managing such activities. The nature of the common law offence of public nuisance, as well as historical legal sources, support this argument. This thesis offers a solution to the legal and practical difficulties that arise in applying public nuisance to sport, making use of comparative legal analysis with the regulatory framework of France, and suggests that Parliament must pass a new regulatory framework to manage public exhibitions of sport.

This thesis recommends in its concluding chapters that legislative reform in the form of either amendment to local government Acts or a new legislative regime dealing with all public exhibitions of sports, be promulgated. Such reform is necessary because:

- Public exhibitions of sport are at risk of proscription as common law public nuisances because they can and do impinge upon public rights by causing obstruction or interference to the public in the exercise of rights common to all.
- Public rights such as the public right of way on the highway, the public right to quietude, and the public right to recreation, for example, are arbitrarily impinged upon by publicly exhibited sports.

- Neither the executive of government, who oftentimes promote public sporting events through wholly owned events and promotions corporations, nor local governments, who invariably grant licenses for a fee to sports event organizers enabling them to conduct their publicly exhibited sport event at a beach, park or road under the management, care and control of the local council, have power at law to authorize, sanction or permit a common law offence. Both forms of government are, in fact, accomplices to a public nuisance offence.

## 5. The nature of the inquiry undertaken

This thesis provides a general discourse on the common law offence of public nuisance across common law jurisdictions and includes analysis of the legal development of the common law offence of public nuisance in some of the common law jurisdictions of the United Kingdom, Ireland, Australia, Canada and the United States. It is worth noting that not every common law jurisdiction possesses judgments on common law public nuisance as applied to sporting activity. No jurisdiction of Australia, for example, contains a judgment on the application of common law public nuisance to sports activity.<sup>35</sup> It is necessary to turn to the common law jurisdictions of England and Wales, Ireland, New York, New Jersey, British Columbia and Ontario, for example, to discover case law where sporting activity has been declared to be a public nuisance. There is but one common law of Australia – and the common law of Australia is informed by these precedents on public nuisance litigation. These juridical pronouncements provide strong persuasive and, where appropriate to each jurisdiction, binding authority in respect of the unlawfulness of publicly exhibited sporting events where public rights are impinged upon. Reference is made to specific legislative provisions and local government regulations in the states of Queensland and New South Wales in Australia, in particular, to provide examples of the manner in which the Executive participates in and promotes public exhibitions of sport. The assessment in this thesis

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<sup>35</sup> There is, however, case law in respect of actions in private nuisance arising from damage caused to residential property adjoining golf clubs and golf courses – see, eg, *Challen v McLeod Country Golf Club* [2004] QCA 358 (Court of Appeal of Queensland); *Champagne View Pty Ltd v Shearwater Resort Management Pty Ltd* [2000] VSC 214 (Supreme Court of Victoria); *Campbelltown Golf Club Limited v Winton* (NSW Court of Appeal, 23 June 1998); *Pringle v Ryde-Parramatta Golf Club* (NSW Court of Appeal, 23 February 1978); and *Lester-Travers v City of Frankston* [1970] VR 2 and discussion at n 855 and accompanying text.

highlights how public rights such as a right to quietude, a right to safety and a right to recreation, may be ignored in the promotion of public sport activity. The intention of this broad-ranging approach is to provide an overview of the common law rules that may have application to each common law jurisdiction and to argue for the need for legislative reform to safeguard both public rights and public sport.

The principal contention of this thesis is that legislative reform is required to both protect publicly exhibited sports from proscription as common law public nuisances and to protect public rights – those rights subsisting in the public and common to all the public, and declared by the courts – from a gradual dissipation. The arguments made in this thesis, in respect of the common law offence of public nuisance, are applicable to each common law jurisdiction and are directed to none in particular. The common law judgments in public nuisance cases in each separate jurisdiction reveal a surprising degree of cross-reference to, and reliance upon, the common law precedents of multiple common law jurisdictions. The arguments are thus somewhat universal.

The question to be addressed in this thesis is whether common law public rights are adequately protected from arbitrary impingement by the conduct of public sport events at public places by reason of the development of the common law in public nuisance litigation, or whether, owing to the participation of the Executive in promoting public sport, law reform in the form of a sports code is warranted. The fact that public rights might be ignored or might be disrupted by the staging of sporting events at public places justifies consideration of the appropriateness of law reform. Also of note are increasing occurrences of public exhibitions of sport at public places,<sup>36</sup> and evidence of reluctance on the part of the Executive to prosecute offences in sport and a failure to uphold basic rights, such as a public right to safety, in sports activity.<sup>37</sup> How are public rights best protected and preserved in an

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<sup>36</sup> Note eg that a sport such as Triathlon was only devised on 24 September 1974, in San Diego, California, and developed in the 1980s, with the International Triathlon Union forming only on 1 April 1989. <<http://www.triathlon.org/about/>> (3 November 2011).

<sup>37</sup> See eg see R Horrow *Sports Violence: The Interaction Between Private Lawmaking and the Criminal Law* (Carrollton Press Arlington Virginia 1980) at pp 110-160. Horrow examines the results of his own 1978 survey of 34 prosecutors, who were solicited about the relative legal inaction against athletes. Many prosecutors feel that prosecuting professional athletes for actions taken during competition would not have a deterrent effect, as most athletes would not view their actions as criminal: see JH Katz 'From the Penalty Box to the Penitentiary – The People Versus Jesse Boulerice' (2000) 31 Rutgers LJ 833 at pp 853- 854. See also BC Nielsen 'Controlling

environment where the Executive is a promoter of public exhibitions of sport and has policy interest in promoting sporting activity in the community?

In being a promoter of public exhibitions of sport that impinge upon public rights, the Executive is complicit in the commission of a public nuisance offence at common law. Public rights may be arbitrarily impinged upon by the staging of public sporting events at public places such as beaches parks and roads. Whilst there is a body of law addressing circumstances where relief has been obtained, the danger is that the public's rights might be continually impinged. The problem is that it is unlawful for the Executive or for Local Government to license public sport at common law, in circumstances where such public sport impinges upon public rights. Yet it continually happens and public rights to recreation, quietude or safety, are in fact ignored, unknown or unrecognized in modern times. The mere fact that public rights and natural rights may be lost warrants consideration as to whether an adequate legal mechanism exists to protect and preserve such rights.

This thesis argues that whilst juridical pronouncements have, at times and intermittently, restrained sport activity in order to protect public rights in cases of public nuisance, in contemporary society and in light of increasing levels of public exhibitions of sport and sport promotion, a uniform approach is appropriate. It is not so much that the development of the common law offence of public nuisance has gone astray as to warrant legislation; but rather, that legislation is warranted in order to adequately ensure that the Executive takes into consideration potential impingement of public rights when promoting or licensing public exhibitions of sport. Legislative reform would promote the need for balanced consideration of public rights on the one hand and the cultural and social benefits of public sporting activity on the other. Public sports are a special category of human activity that depend upon sanction from Parliament for legitimacy because of the risk of impingement of public rights and natural rights.

It is a radical idea which this thesis discusses. To suggest that our venerable and venerated fun runs, marathon events, triathlon and multisport festivals, ironman and surf lifesaving

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Sports Violence: Too Late for Carrots – Bring on the Big Stick' (1989) 74 Iowa L Rev 681. See also W Hechter 'The Criminal Law and Violence in Sports' (1979) 19 Crim LQ 425.

competitions may be unlawful at common law because they are public nuisances causing obstruction or inconvenience to the public in the exercise of their public rights may appear extreme. But, upon detailed research and analyses of case law, this appears to be the legal reality. A few sports – horseracing, motorsports and boxing – are regulated to varying degrees by statute. And in a couple of common law jurisdictions very recent legislation in respect of major sports events has established a regime for the licensing and management of major sports events of significant cultural importance.<sup>38</sup> But not all sports can be said to be protected from proscription, pursuant to legislation.

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<sup>38</sup> See, eg, Major Events Act 2009 (NSW) and Major Sporting Events Act 2009 (Vic). Both enactments are narrow in their scope and regulate only those sporting events declared to be major sporting events. In respect of the New South Wales Major Events Act 2009, only one publicly exhibited sporting event has been authorized under the Major Events Regulation 2010 in New South Wales – the Sydney International FIFA Fan Fest. Under the Victoria legislation, the Major Sporting Events Act 2009, the term “major sporting event” is defined pursuant to section 3 to include sporting events such as the Australian Tennis Open, the Australian Grand Prix, and the Australian Rules Football Grand Final, and analogous events at which spectators are admitted on payment of a fee or charge. Excluded from this definition are sports events staged at public places such as beaches and parks and roads at which members of the public spectate without paying any fee to so do, including triathlon events, surfing events and surf lifesaving tournaments. The many public sporting events that take place at beaches and parks and on roads are not covered by the legislation



## Chapter 2

### Historical sources of regulation of sporting events

Regulating publicly exhibited sports events ought not to be seen as novel or as officious. We know that neither the Crown nor subordinate administrative bodies such as local governments has power at common law or under statute to license the staging of a publicly exhibited sporting event where that event creates a public nuisance by impinging on public rights – it is a fundamental rule of common law that no one can license a public nuisance but Parliament.<sup>39</sup> There is a need to balance competing interests in the use of public spaces such as beaches, parks, and roads. One way in which competing interests can arise is where the use of a public beach by individual citizens engaging in recreative or healthful exercise on that public beach competes with the use of that same public beach by a professional sports association staging a sporting competition in which prize money is offered.

It is helpful for us to realise that governmental regulation and governmental licensing of public sporting activities has existed within the common law legal system since at least the year 1194. There is a considerable body of historical statutory rules controlling or limiting sports activities staged at public spaces which provide useful analogy to the type of regulation which is now warranted because of the fact that the manner in which publicly exhibited sports events are staged can create public nuisances. Whilst various policy reasons may be read to apply to the promulgation of numerous Crown edicts and statutes throughout the preceding millennium (and, indeed, legal historians have attempted to argue that singular policy reasons justify various statutes regulating public sports in the middle

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<sup>39</sup> See, further, the discussion on the limitations on the Executive of government and on local authorities to promote or to license activities deemed to be a public nuisance in Part 4 of this thesis. See, also, *Johnson v City of New York* 186 NY 139, 78 NE 715 (1906); *Attorney-General v Blackpool Corporation* (1907) 71 JP 478. In *The Case of Proclamations* Coke said that “the King cannot change any part of the common law, nor create any offence by his proclamation... without Parliament”: 12 Co Rep 74 at p 75, 77 ER 1352 at p 1353, [1610] EWHC KB J22. See also JD Goldsworthy *The Sovereignty of Parliament* (Oxford University Press Oxford 1999) at p 112.

ages),<sup>40</sup> the fact that proclamations and statutes on sports existed at all indicates that there existed policy reasons justifying their promulgation. The policy aspects of these historical statutes and proclamations provide useful analogy to the policy aspects of the current problem discussed in this thesis; namely, that the manner in which publicly exhibited sports events are staged may create public nuisances at common law. The historical sources discussed in this chapter demonstrate that regulations were ordinarily consistent with the common law proscription of public events based on the principles of the Royal Peace and public nuisance. The historical sources appraised herein comprise of Crown proclamations as well as statutes.

The purpose of this brief review of historical sources of regulation of sporting activities is to highlight, by way of analogy, that the Crown has always played a critical role in managing any impingement of public rights occurring when sporting activities are staged at public spaces, and in limiting harm created by sporting activities staged in public spaces. These sources highlight the *parens patriae* responsibility of the Crown, a responsibility which exists, so far as it applies to the field of sports, to ensure that intemperance or overindulgence in publicly exhibited sporting activity does not wantonly create harm to the public or to the Crown.<sup>41</sup> The Crown's historical relations with its subjects, in recognizing and responding to the

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<sup>40</sup> Sir William Holdsworth, eg, is of the view that the recreations and sports of various classes of society during the fifteenth and sixteenth centuries were matters of statutory intervention in the interests of the state. Rich and poor, high and low alike, must help the state – by the labour of their bodies if they could not help with their counsel or their wealth, he says. Holdsworth sees the statutes 12 Ric II c 6, 11 Hen IV c 4, and 17 Edw IV c 3 as encouraging the practising of archery alone was a policy initiative to train the public in the skills of archery so that they might be useful to the realm in the fighting of wars or in defending the realm. His reading of these statutes as ordering the people to leave playing at 'hand ball or foot ball' or 'such other unthrifty games', and to practice at bows and arrows on Sundays and other festival days: Sir William Holdsworth *A History of English Law* (4<sup>th</sup> edn Methuen & Co London 1936) vol 11, at p 446.

<sup>41</sup> See, further, the discussion on the doctrine of *parens patriae* and the discussion of the case law commenting on it, in Chapter 15, below, at pp 371-381. The *parens patriae* responsibilities of the Executive arise in the context of public sports in three ways. First, the jurisdiction arises as a logical extension of the ancient prerogative duty in respect of children and the mentally impaired. Secondly, *parens patriae* jurisdiction may be invoked in suits involving public rights because public rights are indivisible from the Crown. Thirdly, common law judgments in respect of public land may equate public land as 'trust land'. Any acts purportedly harming trust land invokes *parens patriae* jurisdiction. In *British Columbia v Canadian Forest Products Ltd* [2004] SCC 38 at para [67], [2004] 2 SCR 74, (2004) 240 DLR(4<sup>th</sup>) 1, the Supreme Court of Canada, citing *Stein v Gonzales* [1984] BCSC 344, (1984) 14 DLR(4<sup>th</sup>) 263 at pp 265 and 268 (McLachlin J), attributed the duty of enforcing public rights to the Crown's role as *parens patriae*. See also *Re Eve* [1986] SCC 36 at paras [31]-[43], (1986) 2 SCR at pp 407-17, (1986) 31 DLR(4<sup>th</sup>) at pp 14-21, cited with approval in *Marion's Case* [1992] HCA 15 at paras [68]-[70], (1992) 175 CLR 218; and see *British Columbia v Canadian Forest Products Ltd* [2004] SCC 38 at para [76], [2004] 2 SCR 74, (2004) 240 DLR(4<sup>th</sup>) 1, citing SE Thorne (tr) *Bracton on the Laws and Customs of England* (Belknap Press of Harvard University Press Cambridge 1968) vol 2, at pp 166-67.

advent of public exhibitions of sports, reflect principles of moderation and prudence which are the hallmarks of estimable law.<sup>42</sup> It is important for us to approach these historical sources with an open mind and to avoid the pitfalls of chronocentrism.<sup>43</sup> Chronocentrism is temporal chauvinism. Lawyers who hold to this idea believe the law in their own time to be more highly developed, or more relevant to human experience in general, than in the era which has preceded them. Such lawyers draw artificial and illusory boundaries between the principles of law of previous generations and that of their own time. They complain that it is not possible to transpose the law, institutions, notions, and principles, operating in previous generations to contemporary times without explaining ostensible fundamental societal changes. And they would refute Maitland's counsel that, "If we are content to look no further than the text-books – the books written by lawyers for lawyers – we may read our ways backwards to Blackstone (d 1780), Hale (d 1676), Coke (d 1634), Fitzherbert (d 1538), Littleton (d 1481), Bracton (d 1268), Glanvill (d 1190), until we are in the reign of Henry of Anjou, and yet shall perceive that we are always reading of **one and the same body of law**, though the little body has become great, and the ideas that were few and indefinite have become many and explicit."<sup>44</sup> Yet, if we eschew a chronocentric attitude, we can perceive that the problem we are faced with today (a problem where there is competing interest in the use of public spaces such as public beaches, parks, and roads, between individual citizens on the one hand and organised sporting activity on the other hand), is similar, though not the same, to the problems which earlier governments faced. How do we, as a society, through our government, facilitate recreative activity and healthful exercise whilst limiting the harm that can arise in an unregulated sports environment? And what are the principles of law behind either prohibitive or permissive regulation. There is a balance to be achieved.

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<sup>42</sup> See eg, Montesquieu Bk 3 ch 9; Bk 5, chs 14 and 16; Bk 11, ch 4; and Bk 19, chs 4 and 5: R Caillois (ed) *Oeuvres complètes de Montesquieu* (Bibliothèque de la Pléiade edn Gallimard Paris 1949-51) vol 1; AM Cohler BC Miller and HS Stone (tr) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 112; or JV Prichard (ed) T Nugent (tr) *Charles de Secondat, Baron de Montesquieu: The Spirit of Laws* (G Bell & Sons London 1914) Under Bk 5, ch 14, Montesquieu writes: "Under moderate governments, the law is prudent in all its parts..."

<sup>43</sup> Chronocentrism is a conceited tendency of a contemporary peoples, its values and politics, to see itself as more important, more highly developed, or more relevant to human experience in general than any other era of human evolution. Legal scholars who hold a chronocentric perspective may believe the law in their own time to be superior to that which has preceded them. Their view is that the present moment is intellectually privileged in comparison with the past. Chronocentrism is a term known in scholarship in the arts and in history. See eg GS Morson *Narrative and Freedom: The Shadows of Time* (Yale University Press New Haven and London 1994) at p 236.

<sup>44</sup> FW Maitland *Historical Essays* (Cambridge University Press Cambridge 1957) at p 97.

If we look briefly at the several enactments concerning sports and games, whether Royal Proclamations or Statutes, we see comparable policy reasons underlying their promulgation. Considerations of public order and the desire to limit violence feature predominantly in the reasons for the establishment of laws on sports activities staged in public.

## 1. Historical Proclamations

The Crown has periodically promulgated laws to regulate the practice of sport in public spaces. The earliest of these laws are the proclamation of Richard I in 1194, the *Statuta Armorum* of Edward I in circa 1292, and the *Proclamatio facta pro Conservatione Pacis* of Edward II in 1314. At other times in history, Heads of State have similarly issued edicts to limit human sporting activities which caused harm to the public. Such other edicts are also detailed herein. The earliest regulation of public sporting activity concerned tournaments,<sup>45</sup> jousts,<sup>46</sup> football,<sup>47</sup> and fencing. Later edicts touched on horse racing.

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<sup>45</sup> Strutt, adopting the opinion of Fauchet, is of the opinion that the word tournament in English came from the practice of the knights running par tour, that is, by turns at the quintain – a post used as a target in tilting exercises – wheeling about successively in a circle to repeat their course. In process of time, says Strutt, the knights improved upon this pastime, and to make it the more respectable ran one at another, which certainly bore a much greater semblance of a real engagement, particularly when the knights were divided into large parties, and meeting together combated with clubs or maces, beating each other soundly without any favour or paying the least respect to rank or dignity. J Strutt *The Sports and Pastimes of the People of England* (Chatto and Windus London 1876) at pp 201-202; Fauchet's *Origines des Chevaliers*: C Fauchet *Origines des Chevaliers, Armoiries, et Heraux* (Paris 1600);

<sup>46</sup> Strutt lays it down authoritatively that tournaments and jousts differed materially. The jousts were initially considered as less honourable than the tournaments; according to the customs and laws of the jousts and tournaments relating to use of the lance, sword, and helmet. The tournament was a conflict with many knights, separated into groups, and opposed at the same time. The joust or lance game, termed in the Latin of the day *justa*, and in French, *jouste*, was a sportive combat when only one man contested another. Jousts were often included in tournaments, and usually took place when the grand conflict of the tournament was finished. But the joust, according to the laws of chivalry, might be made exclusive of tournament also. By the fourteenth century, the popularity of jousts with its appeal to spectators killed off the *mêlée* style tournament and tournaments faded into obscurity. The last tournaments were recorded as having taken place at Dunstable in the years 1334 and 1342. See J Strutt *The Sports and Pastimes of the People of England* (Chatto and Windus London 1876) at pp 216-218; C du Fresne du Change *Glossarium ad Scriptores mediae et infimae Latinitatis* (Paris 1840–) under head 'Justa'; R Barber and J Baker *Tournaments* (Boydell and Brewer London 2000) at pp 32-33 and 34; Sir F Madden B Bandinel and others (ed) *Collectanea Topographica et Genealogica* (London 1834-1843) vol 4, at pp 389-395; and EM Thompson (ed) *Adam de Murimuth's Continuatio Chronicarum* (London 1889) at pp 123-124 and 223-224. For an account of young tourneyers in London in about the year 1180 see HE Butler (tr) W Fitzstephen *A Description of London in Sir Frank M Stenton Norman London. An essay ... With a translation of William Fitz Stephen's Description* (G Bell and Sons London 1934). See also 'William fitz Stephen: Description of the city of London

## 2. The Proclamation on Tournaments of Richard I in 1194

Richard I (1189-1199) promulgated an innovative decree on 20<sup>th</sup> August 1194 allowing tournaments to be staged in public in England, against the Catholic Church's interdiction on the practice of tournaments.<sup>48</sup> The decree was a pragmatic attempt to curb the inherent dangers of a sporting craze that would brook no opposition. The *Proclamation on Tournaments*<sup>49</sup> of 20<sup>th</sup> August 1194 established a regulatory system that enabled tournaments to be held legitimately. Only five places in England were declared to be official tournament sites in the proclamation: between Salisbury and Wilton (Wiltshire), Warwick and Kenilworth (Warwickshire), Stamford and Warinford (probably Suffolk), Brackley and Mixbury (Northamptonshire), and Blyth and Tickhill (Nottinghamshire). Any knights who wished to tourney had to first obtain a license from the Crown in the form of a charter for

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(1170-1183)', in DC Douglas and GW Greenaway (ed) *English Historical Documents 1042-1189* (Eyre and Spottiswoode London 1953) at p 960.

<sup>47</sup> For detail on the earliest counts of football as a publicly exhibited sport, see HE Butler (tr) *W Fitzstephen: A Description of London in Sir Frank M Stenton Norman London. An essay ... With a translation of William Fitz Stephen's Description* (G Bell and Sons London 1934). See also 'William fitz Stephen: Description of the city of London (1170-1183)' in DC Douglas and GW Greenaway (ed) *English Historical Documents 1042-1189* (Eyre and Spottiswoode London 1953) at p 960.

<sup>48</sup> In the twelfth and thirteenth centuries, tournaments were forbidden in ecclesiastical law and the knights who took part in them were liable to the severest spiritual penalties. The reason given by the church for the prohibition of tournaments was clear: tournaments imperilled men's lives and put their souls at risk: see — 'Decreta Lateranensis Concilii' in R Howlett (ed) *Chronicles of the reigns of Stephen, Henry II, and Richard I* (Longman & Co London 1884) vol 1, Bk 3, at pp 219-220; C-J von Hefele (Bishop of Rottenburgh) & H Leclercq *Histoire des Conciles d'après les documents originaux* (Paris 1907-) vol 5, Bk 1, at p 729. See also R Barber and J Baker *Tournaments* (Boydell and Brewer London 2000) at pp 17 and 139. The ninth canon of the Council of the church held at Clermont in the year 1130 laid down a prohibition on all tournaments and forbade ecclesiastical burial to anyone fatally wounded in the sport. The canon read: "We firmly prohibit those detestable markets or fairs, at which knights are accustomed to meet to show off their strength and their boldness and at which the deaths of men and dangers to the soul often occur. But if anyone is killed there, even if he demands and is not denied penance and the *viaticum*, ecclesiastical burial shall be withheld from him" (C-J von Hefele (Bishop of Rottenburgh) & H Leclercq *Histoire des Conciles d'après les documents originaux* (Paris 1907-) vol 5, Bk 1, at p 729). The Clermont canon was repeated verbatim and confirmed at the Second Lateran Council in 1139 and also at the Council of Rheims in 1148 (See FH Cripps-Day *The History of the Tournament in England* (London 1918) at p 39). At the Third Lateran Council in 1179 the canon reappeared for the last time with the actual word *torneamenta* added (Hefele & Leclercq (ibid) Bk 2, at p 1102). The official attitude of the church remained unchanged for nearly two hundred years and it was not until the year 1316 that an Avignon Pope revoked the church's ban on tournaments at the request of the French princes (Barber & Baker *Tournaments* (ibid) at p 139).

<sup>49</sup> See Rymer *Foedera* vol i, at p 65; Hoveden *Chronica magistri* vol iii, at p 268; R Howlett (ed) *Chronicles of the reigns of Stephen, Henry II, and Richard I edited from the manuscripts* (Longman London 1884-1889) vol ii, ch IV, at p 422; *Short extracts from Public Records* Additional MS 4712 (British Library) at f 91b; and Harl MS 69 (British Library). See also R Barber and J Baker *Tournaments* (Boydell and Brewer London 2000) at pp 25-27; J Strutt *The Sports and Pastimes of the People of England* (Chatto and Windus London 1876) at p 206; and F Brandt *Games, Gaming and Gamester's Law* (Henry Sweet London 1873) at p 140.

the tournament they desired to hold and could only engage in the tournament at one of the five sites approved in the decree. To obtain a license for a tournament the knight had to pay a fee of ten marks. In addition to this general license, all knights wanting to participate in a tournament as contestants had also to obtain a personal license, for which a fee was charged graduated according to his rank, ranging from twenty marks for an earl, ten marks for a baron, four marks for a knight possessing a landed estate and two marks for a landless knight. No tourneyer of lower status than a landless knight was allowed to partake in the sport and foreign knights were specifically prohibited from tourneying in England.<sup>50</sup> Tournaments were unlawful unless practised in accord with the proclamation under sanction from the Crown.

The *Proclamation on Tournaments* emphasized three legal principles which Richard I and his government saw as justifying his regulation of public exhibitions of tournaments. It is not true that Richard I legitimized tournaments solely because he himself was a tourneyer.<sup>51</sup> Nor was the revenue raised through the licensing system established under the Proclamation the principal motivating force. The *Proclamation on Tournaments* was promulgated: “so that our peace shall not be broken, the power of our justiciary shall not be threatened and loss shall not fall on our royal forests.”<sup>52</sup> The Crown was thus concerned that unregulated public

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<sup>50</sup> *ibid.* See also J Barker *The Tournament in England 1100-1400* (Boydell Press Suffolk 1986) at pp 53-56.

<sup>51</sup> Richard I was a tourneyer himself. Hoveden, who wrote his *Annals* about the year 1191, tells us that Richard I, being at Messina, the capital of Sicily, on his way to the Holy Land as a member of the Third Crusade, went with his convoy one Sunday afternoon to see popular sports exhibited without the walls of the city, and upon their return they met in the street a peasant driving an ass loaded with hollow canes. The king and his entourage each took a cane, and began by way of sport to tilt one against another, arundines quas cannas vocant. The king's opponent was William de Barres, a knight of high rank in the household of the French king (quidam miles optimus de familia regis Franciae). In the encounter they both broke their canes, and the king's hood was torn by the stroke he received (fracta est cappa regis) which made him angry. Riding with great force against the knight, he caused his horse to stumble with him, and while he was attempting to cast him to the ground his own saddle turned round and he himself was overthrown. The king was provided with another horse, stronger than the former, which he mounted, and again assaulted de Barres, endeavouring by violence to throw him from his horse. But the king could not throw de Barres because the knight clung fast to the horse's neck. Robert de Breteuil, earl of Leicester, laid hold upon de Barres to assist the king, but Richard forbade him to interfere, desiring that they might be left to themselves. When they had combated a long time, adding threats to their actions, et dictis et factis, the king was much provoked, and commanded de Barres to leave the place and appear no more before him, declaring at the same time that he would ever after consider him an enemy. But through the mediation of the King of France, a reconciliation was effected, and the knight was again restored to the favour of the monarch: F Brandt Games, Gaming and Gamester's Law (Henry Sweet London 1873) at pp 131-132 relays Hoveden's tale.

<sup>52</sup> *Foedera* vol i, at p 65; Hoveden *Chronica magistri* vol iii, at p 268; R Howlett (ed) *Chronicles of the reigns of Stephen, Henry II, and Richard I edited from the manuscripts* (Longman London 1884-1889) vol ii, ch IV, at p 422; and Harl MS 69 (British Library).

exhibitions of tournaments risked breaches of the peace,<sup>53</sup> public nuisance or damage (to the royal forests), or disregard for the law (whereby the power of our justiciary might be threatened). Richard I thus cited fundamental common law principles, such as the Royal Peace and nuisance, as reason why tournaments were unlawful unless staged at particular designated places under Crown patronage. The choice of only five sites throughout the realm was a deliberate attempt to limit the propensity to breaches of the peace and also to limit damage that was caused by the staging of tournaments. As the tournament stretched over a wide area of countryside, generally, it was in the interests of the Crown to designate specific locations in advance for the exhibition of tournaments, well away from the most vulnerable places such as towns, monastic houses and royal forests.<sup>54</sup> Further, Richard I sought to bring the public practice of the sport within his administrative and judicial authority both to protect his subjects from the Catholic Church's reprove, and to enforce the legal view that no activity was beyond his jurisdiction.

The Proclamation on Tournaments was inimitable; it set England apart from her neighbours.<sup>55</sup> No other government in Europe at the time established a legal system that legitimised public sports as Richard I had done. The unique nature of this decree allowed the model of English tournaments to develop distinctly from tournaments that were practised on the Continent. Although the church still officially disapproved, in England it was permissible to tourney with governmental approval. The fact that a tournament was lawful or unlawful, sanctioned or unsanctioned, gave it a special relationship with the Crown that was simply lacking in other countries. This proclamation allowed English kings to exert a degree of control and influence over the sport that did much to enhance public sports, to limit the harm manifest in the staging of public sports, and to promote the cultural and chivalrous advantages arising from their existence.

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<sup>53</sup> The public peace is the Royal peace and emanates from the constitutions of the Anglo-Saxon kingdoms, at a time when there was not yet a full and broad peace. The King was the general patron and protector of the peace, a principle that later came to be known as *parens patriae*. William I reinforced the notion of the King's peace on the Conquest and provided special safeguard for his followers. In the third of the *Articles of William I*, circa 1068, it is provided that: "all the men whom I brought with me or who have come after me shall be in my peace and quiet." See Sir Carleton Kemp Allen *The Queen's Peace* (Stevens and Sons Limited London 1953) at pp 8-11 and 23-25.

<sup>54</sup> See R Barber and J Baker *Tournaments* (Boydell and Brewer London 2000) at p 25.

<sup>55</sup> R Barber and J Baker *Tournaments* (Boydell and Brewer London 2000) at p. 29.

### 3. The *Statuta Armorum* of Edward I in 1292

Tournaments often engendered breaches of the peace, public crimes, and disturbances. A tournament at Blyth in 1237 between northerners and southerners turned into a battle and the papal legate had to be called in to settle the competitors.<sup>56</sup> The 'Fair of Boston' in 1288 saw squires, participating in a tournament, run riot and burn half the town – perhaps one of the earliest examples of hooliganism in sport.<sup>57</sup> The dilemma of public safety at tournaments was illustrated clearly by the pronouncement of the *Statuta Armorum*,<sup>58</sup> which was promulgated by Edward I circa 1292. The *Statuta Armorum* was concerned with arresting, or at the least minimizing, the harm created by the mass of participants in, and spectators of, tournaments that often ended in the pillage and slaughter of local villagers and townspeople.<sup>59</sup> This statute was a formal legal attempt to prevent tournaments from impinging upon the public rights of safety and of life of residents living adjacent to the places where public tournament and jousting exhibitions were staged and was directed not only to the tourneyers themselves, but also to their retinues and attendants, who were the usual source of trouble – the supporters, as well as the players. The decree came at a time when the welfare of ordinary members of the public was a real concern arising from the holding of tournaments.

First in the proclamation was a command that no earl, baron, or other knight, attending at tournaments have more than three esquires in attendance to serve him at tournaments. The penalty for earls, barons and knights for infringement of this regulation was forfeiture of his horse and his arms, and the pain of imprisonment at the pleasure of the governors of the tournament. This part reads thus: -

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<sup>56</sup> Matthew Paris *Chronica Majora* vol III, at p 404.

<sup>57</sup> R Barber and J Baker *Tournaments* (Boydell and Brewer London 2000) at p 148.

<sup>58</sup> See Danby Pickering (ed) *The Statutes at Large* (Joseph Bentham London 1762) vol 1. See also A Luders (ed) *The Statutes of the Realm: Printed by Command of His Majesty King George the Third, in Pursuance of an Address of the House of Commons of Great Britain, From Original Records and Authentic Manuscripts, 11 vols* (Record Commission London 1810-1828) vol 1, at pp 230-231.

<sup>59</sup> N Denholm-Young 'The Tournament in the Thirteenth-Century' in RW Hunt WA Pantin and RW Southern *Studies in Medieval History Presented Frederick Maurice Powicke* (Clarendon Press Oxford 1948) at pp 260-261, and 264.



“At the request of the Earls and Barons and of the Chivalry of England, it is ordained and by our Lord the King commanded, that from henceforth none be so hardy, whether Earl, Baron, or other Knight, who shall go to the Tournament, to have more than three Esquires in Arms to serve him at the Tournament; and that every Esquire do bear a Cap of the Arms of his Lord, whom he shall serve that day, for Ensign.”<sup>60</sup>

The proclamation regulated the permissible types of arms to be used in tournaments. No knight or squire serving at the tournament was permitted to bear a sword pointed, or dagger pointed, or staff or mace, or truncheon or other weapon, but only a broad sword for tourneying. All combatants who bore lances were commanded to be armed with breastplates, thigh-pieces, shoulder-pieces, and helmets, without any other kind of armour. In case of transgression, a knight was liable to forfeit his horse, and to imprisonment for one year. An esquire found offending against the ordinance, in any point, liable to lose Horse and Harness, and to be imprisoned three years. The rules of the tournament were to be strictly enforced; only competitors were allowed the privilege of combat. All others were prohibited from combating with anyone outside the tournament: “And if any man shall cast a knight to the ground, except they who are armed for their Lord's service, the knight shall have his horse, and the offender shall be punished as the Esquires aforesaid [namely, one year's imprisonment].”<sup>61</sup>

And spectators at the tournaments were prohibited from attending with arms: “they who shall come to see the tournament, shall not be armed with any manner of armour, and shall bear no sword, or dagger, or staff, or mace, or stone, upon such forfeiture as in the case of Esquires aforesaid [namely, one year's imprisonment].” And no boy or man on foot, coming for the same purpose, might appear with a sword, dagger, cudgel, or lance: “no groom or

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<sup>60</sup> Danby Pickering (ed) *The Statutes at Large* (Joseph Bentham London 1762) vol 1. See also A Luders (ed) *The Statutes of the Realm: Printed by Command of His Majesty King George the Third, in Pursuance of an Address of the House of Commons of Great Britain, From Original Records and Authentic Manuscripts, 11 vols* (Record Commission London 1810-1828) vol 1, at pp 230-231.

<sup>61</sup> *ibid.*

footman shall bear sword, or dagger, or staff, or stone; and if they be found offending, they shall be imprisoned for seven years.’<sup>62</sup>

The regulations endeavoured to limit harm that was created by the practice of tournaments. The limiting of arms, the proscription on spectators and officials of bearing arms, the requirement that knights participating in tournaments wear appropriate protective armour; all these regulations were directed to limit the likelihood of personal injury, of breaches of the peace, and of endangering the safety or life of the people. This proclamation demonstrates that the Crown was intimately concerned with the welfare of the people, consistent with their *parens patriae* jurisdiction, at the staging of a public sport.

#### 4. The *Proclamatio facta pro Conservatione Pacis* of Edward II in 1314

The manner in which football and fencing, in particular, were practised in fourteenth century London was cited as justification for the issuance of a proclamation banning those two sports. On 13<sup>th</sup> April 1314, Edward II commanded that a proclamation concerning the king’s peace, and forbidding certain sports to be practised publicly in London, be promulgated by the Mayor of London, Nicholaus de Farndone. Only football and fencing were referred to in the proclamation. The proclamation reads: -

“Whereas our Lord the King is going towards the parts of Scotland, in his war against his enemies, and has especially commanded us strictly to keep his peace, as of right we are bound, and the more especially by reason of his going aforesaid; we do command you on behalf of the King, that no denizen, or stranger, shall do anything against his peace, or his dignity, or his crown, within the town or without; ...and that no one shall keep within the City, or in the liberty thereof, a school for fencing... And whereas there is great noise in the City, by some tumults arising from the kicking a great foot-balls in the public fields, from which many evils might arise which God forbid, we do command and do

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<sup>62</sup> *ibid.*

forbid, by the King, upon pain of imprisonment, that such game shall be practised from henceforth within the City: and that all the points of old proclaimed in the said City, for keeping the peace of our Lord the King shall be well and strictly kept by day and by night, under the peril that thereunto pertains.”<sup>63</sup>

In this proclamation Edward II commanded that nothing be done in London that was against the king’s peace, against his dignity, or against his crown. Pursuant to the proclamation, public participation in sporting activities either in the public fields of London and in schools for fencing were proscribed. Of note in this proclamation is that both the sports of football and fencing were so well known or established as public exercises or sports in the year 1314 that they merited comment in the form of a Royal Proclamation. Of note, also, is that fencing and football were possessing such propensity to cause harm that they warranted intervention and proscription by the government of the day. The Crown cited its duty to preserve the peace as a legitimate principle underscoring the prohibitions: for there is great uproar or inciting of quarrels, ‘*et pur ceo graunt noise est en la Cité*’, and certain rages or tumults, ‘*par ascunes rageries*’, and many other evils which are likely to occur, ‘*dout plusours maux par cas purrount avenir*’, arising from the playing at football in the public fields of London in the year 1314.

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<sup>63</sup> *Proclamatio facta pro Conservatione Pacis* (Extract from the Liber Memorandum) in HT Riley (ed) *Munimenta Gildhallae Londoniensis; Liber Albus, Liber Custumarum, et Liber Horn* (Longman London 1862) vol 3, at pp 439-441. See also Nicholas de Farndone, Mayor, in 1314, *Liber Memorandum* (preserved at Guildhall) folio 66. The Anglo-Norman text of the proclamation reads:-

“Proclamatio faca pro Conservatione Pacis.

Virtute istius brevis, Nicholaus de Farndone, tunc Major, fecit inquirere per probos homines singularum Wardarum de malefactoribus et nocte vagantibus, et fecit proclamare per totam Civitatem proclamationem subscriptam in haec verba:-

Por ceo qu nostre Seignur le Roi est en alant vers les parties dEscoce, en sa guere sure ses enemis, et nous ad commande espesement sa pes fermement garder, come nous fumes de droit tenuz, et le plus especiaument pur son aler avantdit: vous comandoms depar le Roi, qe nul prive, nestrage, face chose counter sa pes, ne sa dignite, ne sa coroune, dedenz la ville ne dehors; ne qe nul aille armee, ne porte arme, suspecionusement deinz las Cite, en affray ne a peril del poeple; ne qu nul aille wakeraunt de nuyt par male agaite, ne en autre manere, outré corfu sonee; ne qe nul ne tiegne deinz la Cite, nen la fraunchise de ycele, escole de eskyrmerie. Et sil aviegne qe nul destourbour de la pes le Roi, ou desobeissant a ses ministres, soit trouvee, tauntost soit pris et arrestu, et par my minister livere a la prison, et illueques a demorer tant come par jugement soit delivere. Et pur ceo qe graunt noise est en la Cité, par ascunes rageries de grosses pelotes de pee ferir en prees du poeple, dout plusours maux par cas purrount avenir, qe Dieu defend, comandoms et defendoms, par le Roi, sur peine denprisonement, tieu jeu user deinz la Cite desore enavant: et qe touz les poinz criez en la dite Cite auciens, pur la pes nostre Seignur le Roi garder, soient bien et fermement gardez de jour et de nuyte, sur le peril qe appent.”

The issuance of the *Proclamatio facta pro Conservatione Pacis* in 1314 was the first Crown proclamation to refer to football and to ban its practice. Football was not a new game in 1314. The game of football was noted as having been played in the public fields of London as early as 1180. Fitzstephen describes the schoolboys and young men of London, on Carnival day, going out into the fields in the suburbs after dinner to play ball.<sup>64</sup> But the game of football was not an innocent recreation devoid of harm. The early form of the game, most often played on Shrove Tuesdays and other Holy Days, involved only slightly structured contests between the youth of neighbouring villages and towns.<sup>65</sup> The sport, exhibited publicly over extensive public spaces such as public fields and on highways between villages, is depicted clearly in accounts of the sixteenth century: -

“...As concerning footeball playeing; I protest unto you, it maie rather bee called a freendly kinde of fight, then a plaie or recreation. A bloodie and Murtheryng practise, then a fellowlie sporte or pastime. For, dooeth not every one lye in waite for his adversarie, seekyng to overthrowe hym, and to picke hym on his nose, though it bee upon harde stones, in ditche or dale, in valley or hill, or what place so ever it be, he careth not, so he maie have him downe. And he that can serve the moste at this fashion, he is counted the onely fellowe, and who but he: So that by this meanes, sometimes their necks are broken, sometimes their backes, sometimes their legges, sometime their armes, sometyme one parte thrust out of joynte, sometime another... But who so ever scapeth awaie the best goeth not scot-free, but is either sore wounded and brused, so as he dieth of it, or els scapeth very hardlie: And no mervaile for thei have sleights to meete one betwixt twoo, to dashe hym against the harte with their elbowes, to hitte hym under the shorte Ribbes, with their gripped fistes, and with their knees, to catche him upon the hip, and to pick him on his necke, with an hundred suche murtheryng deviles: And hereof

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<sup>64</sup> HE Butler (tr) *W Fitzstephen: A Description of London in Sir Frank M Stenton Norman London. An essay ... With a translation of William Fitz Stephen's Description* (G Bell and Sons London 1934). See also ‘William fitz Stephen: Description of the city of London (1170-1183)’ in DC Douglas and GW Greenaway (ed) *English Historical Documents 1042-1189* (Eyre and Spottiswoode London 1953) at p 960.

<sup>65</sup> See further FP ‘Football in Medieval England and in Middle-English Literature’ (1929) 35(1) *American Historical Review* at pp 33-45.

groweth envie, malice, rancor, cholour, hatred, displeasure, enmitie, and what not els: And sometimes fightyng, maulyng, contention, quarrell pickyng, murther, homicide, and greate effusion of blood, as experience daiely teacheth.”<sup>66</sup>

## 5. Other historical proclamations

The Crown also issued warrants, commissions and Letters Patent in connection with public exhibitions of sport.<sup>67</sup> For example, a proclamation for revoking the Commission concerning Archery was issued by King James I.<sup>68</sup> James I also issued a Declaration to his Subjects concerning lawful Sports to be used.<sup>69</sup> Henry VIII issued Letters Patent to John Newman, and his wife Joan Newman, to keep open Bowling Alleys in London in 1537.<sup>70</sup> Elizabeth I issued Commissions granting rights of enforcement of statutory and common law proscriptions of sports and games to certified peace officers.<sup>71</sup> And the Crown regulated

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<sup>66</sup> P Stubbes *The Anatomie of Abuses* (Richard Jones London 1583) at f 120b. Phillip Stubbes (fl 1583-1591) was a Puritan pamphleteer. *The Anatomie of Abuses* is a denunciation of evil customs of the time which, in the author’s opinion, needed abolition. It is one of the principal sources of information on the social and economic conditions of the period: M Drabble (ed) *The Oxford Companion to English Literature* (OUP Oxford 1989) at p 946.

<sup>67</sup> See eg Cotton MS Titus B I (State Papers and Letters-Temporal Hen VII to Hen VIII, British Library) at folio 523; —‘Letter from King Henry VIII to Sir Thomas Arundell, Justice of the Peace for Cornwall’ in Stowe MS 142 (State Papers 1375-1810, British Library) at folios 14 and 15. In a letter from Mr. Recorder Fleetwood to Lord Burghley, the Lord High Treasurer of England, on November 13, 1585, Fleetwood complains of the grant of a license to practise unlawful games. In support of his complaint he notes the statute and common law proscriptions. Lansdowne MS 44 (Burghley Papers 1585, British Library) at folios 123-124. See also ‘Letter of the Privy Council’ in Egerton MS 2644 (Barrington Papers British Library) vol I, at folio 27; and — ‘Letters Patent of Queen Elizabeth’ in Egerton MS 2623 (British Library) at folio 11.

<sup>68</sup> —‘By the King, A Proclamation for revoking the Commission concerning Archery’ in *Proclamations etc.* II (British Library) Shelfmark c.112.h.3, at document 2.

<sup>69</sup> —‘The Kings Majesties Declaration to His Subjects concerning lawful Sports to bee used’ in *Royal Decrees and Declarations 1611-80* (British Library) Shelfmark 517.k.3.(6).

<sup>70</sup> —‘Copy of Letter Patent to John Newman, and his wife Joan Newman, to keep open Bowling Alleys in London. 29 Hen VIII’ in Additional MS 4535 (British Library) at folio 53. *Letters patent* are a type of legal instrument in the form of an open letter issued by a monarch or government granting an office, a right, monopoly, title, or status to a person or to some entity such as a corporation. The opposite of *letters patent* is *letters close* which are personal in nature and sealed so that only the recipient can read the contents of the letter. *Letters patent* are issued under the prerogative powers of the head of State and constitute a rare, if significant, form of legislation without the consent of Parliament. They have remained an unchanged aspect of government administration and constitutional law for several hundred years: See JJ Bagley *Historical Interpretation: Sources of Medieval History* (David & Charles Newton Abbott London 1972) vol 1, at pp 96-99, and 260-61.

<sup>71</sup> —‘Petition to the Council, Commission of Queen Elizabeth’ in Lansdowne MS 22 (Burghley Papers 1567, British Library) at folios 110 to 114; —‘Certificate from the Justices of various counties to the Lord Keeper of the names of persons duly qualified for the execution of the Commission’ in Lansdowne MS 110 (Burghley

sports in the new colony of Carolina in North America by proscribing certain sports and establishing a minister responsible for such regulation.<sup>72</sup> On 13<sup>th</sup> January 1615, James I issued an *Order touching Foot-Ball*. The proclamation stated: “Whereas greate disorders and tumults doe often arise and happen within the streetes and lanes neere adjoyninge to y<sup>e</sup> Cittye of London by playinge at the foote-ball: It is now Ordered that henceforthe all Constables doe from tyme to tyme repressse and restrayne all manner of Footeball-playe in the lanes and streetes adjoyninge to the Cittye of London.”<sup>73</sup>

A proclamation issued by the Governor of the colony of New South Wales, Lachlan Macquarie, on 11<sup>th</sup> September 1819, was directed to limit the harm generated by the staging of horseraces in Sydney. The proclamation stated:

“It being reported to His Excellency the Governor that frequent and numerous assemblages of people have of late taken place on the Race Course in Hyde Park, and that the amusement of horse racing instead of being confined as formerly, to a particular time and season, under the express sanction of His Excellency, has degenerated into a system of low gambling and dissipation, at once injurious to the property of those concerned in it, militating with the industry of the people, and subversive of order and good morals: His Excellency is hereon pleased to order and direct, that no Horse Races shall in future take place on the Race Course in Sydney without special permission first had and obtained in writing from His Excellency for that express purpose; and all Magistrates and Peace Officers are hereby called on and required to disperse all such illegal meetings as shall hereafter take place at Sydney for the purpose of horse racing or other unsanctioned pastime.”<sup>74</sup>

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Papers, British Library) at folio 46; —‘Birch Collection: Warrants for Paying Money 1655-1658’ in Additional MS 4196 (British Library) at folios 258 and 330

<sup>72</sup> —‘The Fundamental Constitutions of Carolina’ in Additional MS 19374 (British Library).

<sup>73</sup> *J P Reg*, JC Jeaffreson (ed) ‘Middlesex Sessions Rolls: 1615’ *Middlesex county records: 1603-25* (1887) vol 2, at pp 107-119 <<http://www.british-history.ac.uk/report.aspx?compid=65991>> (2 April 2009).

<sup>74</sup> New South Wales State Reference Library MFLM 929.3944 1989: Colonial Secretary’s Papers 1788-1825 [microform] AO/SR 6048. 336477 69370958.

Each of the foregoing proclamations manifest the Crown's concern, as *parens patriae*, for the wellbeing of the people.<sup>75</sup> Of concern for the Crown was the fact that public sporting activities created 'disorders and tumults' either in public parks (as was noted in the proclamation of Edward II in 1314 and the proclamation of Governor Macquarie of the Colony of Sydney in 1819) or in the streets and lanes of cities (as was noted in the proclamation of James I in 1615). There is a principle of law perceptible in these proclamations: whilst any of the historical public sporting activities may have been popular, no jingoistic majoritarian passion could lawfully displace the public's right to peace, security, or quietude or any of the other enumerated common law public rights. Whilst it is possible to view each of these edicts as but exemplars of autocratic suppression, in truth these edicts tell a different story. The Crown has a very real concern, as *parens patriae*, for the safety, health and wellbeing of the people, as well concern for the public peace. Tournaments and football matches of earlier centuries were played over a wide area in royal forests, in cities and towns, on village greens and on the highways. Historical horse races, in their profligacy, adversely impacted upon society. The statutory and royal prohibitions were directed at the manner in which these public sporting activities occurred moreso than that the people

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<sup>75</sup> cf Ordinance of Edward III in the year 1365 which proscribed the playing of football in public, along with other sports. This Ordinance was promulgated not in cognizance of a power to protect the public peace, but in order to effect governmental policy for the teaching and training in the skill of archery. This Ordinance prohibited under penalty of imprisonment all and sundry from stone, wood and iron throwing games; handball, football, or hockey; coursing and cock-fighting, or other such idle games. The Ordinance 39 Edw III (1365) memb 23d reads: "June 12. Westminster. To the sheriffs of London Order to cause a proclamation to be made that every able and bodied man of the said city on feast days when he has leisure shall in his sports use bows and arrows or pellets or bolts, and shall learn and practise the art of shooting, forbidding them under pain of imprisonment to meddle in the hurling of stones, loggats and quoits, handball, football, club ball, cambuc, cock fighting or other vain games of no value; as the people of the realm, noble and simple, used heretofore to practise the said art in their sports, whence by God's help came forth honour to the kingdom and advantage to the king in his actions of war, and now the said art is almost wholly disused, and the people indulge in the games aforesaid and in other dishonest and unthrifty or idle games, whereby the realm is like to be without archers. By K. [Foedera] The like to singular the sheriffs of England [Ibid]". See HC Maxwell Lyte (ed) 'Close Rolls, Edward III: June 1365' *Calendar of Close Rolls, Edward III, 1364-1368*, (HMSO, London, 1910), vol 12, at pp 181-187. Sports historians believe that the sport of throwing iron no doubt included contests with shot, discus or quoit. Cambuc was a game in which a small wooden ball was propelled forward with a curved stick or mallet and thus the ancestor of golf, croquet and hockey. Club ball was the term used to denote a rounders-type game and believed to be the source of cricket and baseball. See Sir Derek Birley *Sport and the Making of Britain* at p 36; Sir Guy Campbell 'The Early History of English Golf' in B Darwin (ed) *History of Golf in Britain* (London 1952) at pp 44-45. Football was banned, as the historian Strutt suggests, "not, perhaps from any particular objection to the sport in itself, but because it co-operated, with other favourite amusements, to impede the progress of archery" (J Strutt *The Sports and Pastimes of the People of England* (Chatto and Windus London 1876) at p 94). Other historians support this idea (Sir Derek Birley *Sport and the Making of Britain* at p 36).

should be forbidden from practising any recreation. It was the immoderation of publicly exhibited sporting activities that was injurious.

Are the circumstances of the *Dewar* case in 1899,<sup>76</sup> or the *Rowing Regatta* case in 1852,<sup>77</sup> where residents living adjacent the racecourse or lake where public sports were exhibited suffered damage from spectators attending those events, so very different from the fear or inconvenience experienced by former villagers in former times? Is the damage created by spectators urinating and throwing rubbish in resident's gardens, trampling on their lawns, breaking down their fences, and otherwise disturbing their quietude, so very different from the bellicose mob engaging in a football game in the fourteenth century? Is Mr and Mrs Dewar's fear of the throwing of bottles of alcohol into their garden and of the use of expletives by a crowd attending horse races materially different from the experiences of villagers living adjacent to the place where a tournament was staged in the fourteenth century? The reality in modern times is that athletes *do* commit crimes on the playing field; and for a variety of reasons, not the least of which is to settle personal scores.<sup>78</sup> Those associated with sport, including players, *do* become involved in bribery scandals.<sup>79</sup> The managers of our sports *are* on occasion corrupt.<sup>80</sup> Athletes and spectators *are* killed at public sporting events.<sup>81</sup> And riot and damage occurs *often* in the aftermath of competitions.<sup>82</sup>

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<sup>76</sup> *Dewar v City and Suburban Race Course Co* [1899] 1 IR 345.

<sup>77</sup> *Bostock v North Staffordshire R Co* (1852) 5 De G & Sm 584, (1852) 64 ER 1253.

<sup>78</sup> See eg, North American prosecutions against players in ice hockey: *R v Ciccirelli* [1989] 54 CCC(3d) 121; *R v McSorley* (2000) BCPC 116.

<sup>79</sup> See eg, the match-fixing scandals in cricket and the recent litigation over bans to players issued by the Board of Control for Cricket in India : *Ajay Jadeja v BCCI & Ors*, Case No FAOOS 226/2003, The High Court of Delhi at New Delhi; and *Mohammad Azhburuddin v BCCI & Ors*, Case No. CCCA 408/2003, High Court of Andhra Pradesh, Hyderabad.

<sup>80</sup> The International Olympic Committee, the pinnacle sports event administrator was involved in a widespread corruption scandal concerning the Summer Olympic Games in Sydney in 2000 and the Winter Olympic Games in Salt Lake City in 2002.

<sup>81</sup> There are literally thousands of accounts. One study suggests that between 1933 and 1976 organised football in the United States claimed the lives of 1,198 participants: J Yates and W Gillespie 'The Problem of Sport Violence and the Criminal Prosecution Solution' (2002) 12 Cornell J L & Pub Pol'y 145 at p 148, citing RB Horrow 'Violence in Professional Sports: Is it Part of the Game?' (1982) 9 J Legis 1 at p 1. Deaths in sport have been the subject of litigation. See eg, *R v Bradshaw* (1878) 14 Cox CC 83; *R v Moore* (1898) 14 TLR 229; and *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205. We may also note the Hillsborough disaster in Britain. See eg, the litigation arising from the Hillsborough disaster: *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. Ninety-six spectators died, being crushed to death, and hundreds more were injured, as a result of crowd disorder in Spectator Pens 3 and 4 at the Leppings Lane end of the Hillsborough Football Stadium in Sheffield on 15<sup>th</sup> April 1989. Lord Justice Taylor's interim report on the incident included a number of recommendations relating to crowd control and safety at sporting events: *The Hillsborough Stadium Disaster, 15<sup>th</sup> April 1989, Inquiry by the Rt Hon Lord Justice Taylor*, Interim report, (HMSO, London, 1989). Recommendations



These concerns are concerns that are similar to the concerns of previous governments regulating sport in previous centuries. What concerned the Crown in the Middle Ages and what ought to concern the Crown today is the **potential** harm which public exhibitions of sport give rise to. This harm is measured in the impact which public exhibitions of sporting events have on the local environment and on public rights. Whether these public rights be the right to health or life, protected by the Crown's ordinance of 1365, or whether these public rights be the right to quietude, protected by the grant of an injunction in *Dewar*,<sup>83</sup> and in *Bostock v North Staffordshire R Co*,<sup>84</sup> in the nineteenth century, is incidental. Is a crowd of 10,000 spectators occupying a public beach to observe a surfing competition incapable of damaging the flora and fauna of the beach? Is such a crowd incapable of impinging on public rights? The point is that the Crown was involved in previous times in protecting public rights, either directly through issuing proclamations or indirectly through civil suits for the abatement of sporting activities creating public nuisance.<sup>85</sup> It is only the contemporary Crown, in the twenty-first century, who appear obtuse; reticent to control the excesses of, or risks associated with, publicly exhibited sporting events; and imperceptive of their paramount *parens patriae* responsibility to safeguard public rights.<sup>86</sup>

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made include the setting up of maximum capacities for terraces, reviews of safety certificates and improved planning and liaison by police and emergency services.

<sup>82</sup> See eg, *Committee of Inquiry into Crowd Safety and Control at Sports Grounds*, Interim report (Popplewell report), (HMSO, London, 1985), Cmnd 9585 – a report on the fire at Bradford City Football Ground in 1985 which resulted in 56 deaths and the riot at Birmingham City Football Ground in 1985; and *Committee of Inquiry into Crowd Safety and Control at Sports Grounds*, Final report (Popplewell report), (HMSO, London, 1986), Cmnd 9710 – a report on the Heysel Stadium tragedy in Brussels in 1985 where 38 people were killed and 100 were injured when fans rioted.

<sup>83</sup> *Dewar v City and Suburban Race Course Co* [1899] 1 IR 345.

<sup>84</sup> (1852) 5 De G & Sm 584, (1852) 64 ER 1253.

<sup>85</sup> Note eg *Attorney-General v Blackpool Corporation* (1907) 71 JP 478.

<sup>86</sup> For a comprehensive discussion concerning the several factors that have an effect on a prosecutor's decision to adjudicate professional sport violence see R Horrow *Sports Violence: The Interaction Between Private Lawmaking and the Criminal Law* (Carrollton Press Arlington Virginia 1980) at pp 110-160. Horrow examines the results of his own 1978 survey of 34 prosecutors, who were solicited about the relative legal inaction against athletes. Many prosecutors feel that prosecuting professional athletes for actions taken during competition would not have a deterrent effect, as most athletes would not view their actions as criminal: see JH Katz 'From the Penalty Box to the Penitentiary – The People Versus Jesse Boulerice' (2000) 31 Rutgers LJ 833 at pp 853-854. See also BC Nielsen 'Controlling Sports Violence: Too Late for Carrots – Bring on the Big Stick' (1989) 74 Iowa L Rev 681. Nielsen provides the view that: "Only through a strict 'get tough' policy of prosecutorial intervention will athletes reevaluate their attitudes and adjust their athletic activities to conform to socially acceptable forms of behaviour." (ibid at p 711). See also W Hechter 'The Criminal Law and Violence in Sports' (1979) 19 Crim LQ 425.

## 6. Historical Statutes

Proscriptions of public sporting activities were issued not only in the form of Crown proclamations, but were also provided by Parliament. From the fourteenth century onwards, the Parliament was used by the King and his Council for the making of statutes. Statutes from the fourteenth century onwards were not merely examples of the will of the Crown.<sup>87</sup> Rather, the Executive did, in fact, rely on the Parliament to ameliorate proposed laws.<sup>88</sup> Parliament itself became more involved in legislation with the Parliament requesting the Crown to legislate on some particular matter. Professor Plucknett states the parliamentary process thus: “As we pass through the fourteenth century, parliamentary legislation becomes more and more general... [W]e also find that Parliament will request the Crown to legislate upon some particular matter. At first we find general complaints put in the form of a petition, either by particular members, or outsiders and local bodies. Next, come petitions by the whole Commons. Such petitions will state grievances and pray for a remedy. When the Parliament is over, the Council will consider these requests at its leisure, and if it thinks legislation is necessary it will prepare it according to its discretion and publish it as a statute with parliamentary authority.”<sup>89</sup> From Tudor times statutes became legislative acts of the Crown in Parliament. These statutes originated in Parliament on the motion of some member or of a minister of the Crown, and consequently the whole community is understood to be involved in their creation. It is from the early statutes proscribing sports that we can see the correlation between common law principles and those principles extant

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<sup>87</sup> By contrast, a statute earlier than the fourteenth century, in the reign of Edward I, for example, is simply a law established by royal authority and cannot accurately be said to be illustrative of civic attitudes. “... [W]hether [a statute] is established by the King in Council, or in a Parliament of nobles, or in a Parliament of nobles and commons as well, is completely immaterial. It is equally immaterial what form the statute takes, whether it be a charter, or a statute enrolled and proclaimed, or merely an administrative expression of the royal will notified to the judicial authorities by means of a letter close... In short, while we are in the reign of Edward I we feel the typical medieval atmosphere, which was, above all, intensely practical. The great concern of the government was to govern, and if in the course of its duties legislation became necessary, then it was effected simply and quickly without any complications or formalities.” T.F.T. Plucknett *A Concise History of the Common Law* (5<sup>th</sup> edn Little Brown & Co Boston 1956) at p 322.

<sup>88</sup> See eg Plucknett *ibid*.

<sup>89</sup> *ibid* at p 323. The government did not always act upon a petition. Even after a statute had been passed the Crown assumed wide powers of altering or suspending a statute. At other times the Commons is found complaining that although they had petitioned for one thing, the Council had legislated along different lines of which they did not approve.

in the statutes. There appears a remarkable consistency between the common law on the subject of sport and the statutes on that same field.<sup>90</sup>

The edicts of Richard I in 1194 and Edward I in circa 1292, of Edward II in 1314, as detailed above, each provide purposes for the regulation of sport. Principal among the purposes cited in each of the proclamations is the need to maintain the public peace, protect public safety, and minimize harm to communities where public sporting activity took place. Statutes promulgated by the English and British Parliament from the fifteenth century likewise cited purposes of public safety and the public peace. The statute of *17 Edw 4 c. 3* (1477), ‘Against Unlawful Games’, declared that any governor or occupier of any house, tenement, garden, or other place was forbidden from willingly suffering “any person to occupy or play any of the said games called cloysh, kailes, half-bowl, hand in and hand out, or queckboard, or any of them, within any of their said houses, tenements, gardens, or any other place, upon pain to have the imprisonment of three years, and to forfeit and lose for every offence, xx. li.” Also forbidden were ‘dice, coits, tennis, and such like games’. The statute cited as grounds for the proscriptions the fact that “divers and many murders, robberies, and other heinous felonies be oftentimes committed and done in divers parts of this realm, to the great inquieting and trouble of many good and well-disposed persons, and the importune loss of their goods” consequent to the playing of the enumerated sports and games.<sup>91</sup>

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<sup>90</sup> This consistency can be seen in the language of the judges in the cases of *Bell v The Bishop of Norwich* (1566) 3 Dyer 254b; *Case of Monopolies* (1602) 11 Co Rep 84b; *Whaley v Pajot* (1799) 2 B & P 51 (Lord Eldon CJ); *Hunt v Bell* (1822) 1 Bing 1; and *R v Coney* (1882) 8 QBD 534; and statutes such as 33 Henry 8 c 9 (1541) and 16 Charles 2 c 7 (1664). The common law case law in various jurisdictions of America demonstrate similar consistency with both the common law principles in England and with the local and English statutes regulating sports and games: *Commonwealth v McGovern* 116 Ky 212, 75 SW 261 (1903); *The State of Louisiana v The Olympic Club* 17 So 599 (1895); *The Columbian Athletic Club v State, ex rel McMahan* 143 Ind 98, 40 NE 914 (1895); *Johnson v City of New York* 186 NY 139, 78 NE 715 (1906), 109 AD 821, 96 NYS 754 (1905); *Swigart v People of the State of Illinois* 50 Ill App 181 (1892), 154 Ill 284, 40 NE 432 (1895); and *Zwirn v Galento* 288 NY 428, 43 NE2d 474 (1942).

<sup>91</sup> The statutory provision reads in whole: “ITEM, whereas by the laws of this land no person should use any unlawful games, as dice, coits, tennis, and such like games, but that every person strong and able of body should use his bow, because that the defence of this land was much by archers, contrary to which laws the games aforesaid and many new imagined games, called cloysh [nine pins], kailes, half-bowl, hand in and hand out, and queckboard be daily used in divers parts of this land, as well by persons of good reputation, as of small having: and such evil disposed persons that doubt not to offend God in not observing their holy days, nor in breaking the laws of the lands to their own impoverishment, and by their ungracious procurement and encouraging do bring other to such games, till they be utterly undone and impoverished of their goods, to the pernicious example of divers of the King’s liege people, if such unprofitable games should be suffered long to continue, because that by the mean thereof divers and many murders, robberies, and other heinous felonies be

The statute *33 Hen 8 c. 9 (1541)* stated as amongst its purposes, in part 5 of the Preamble to the statute, the fact that regulation of the “customable usage of tennis-play, bowls, cloysh, and other unlawful games, prohibited by many good and beneficial statutes by authority of parliament” was warranted because “great impoverishment hath ensued and many heinous murders, robberies and felonies were committed and done, and also the divine service of God by such misdoers on holy and festival days, not heard or solemnized, to the high displeasure of Almighty God...”

The statute of *2 & 3 Phil & Mary c. 9 (1555)* declared somewhat paranoically that public sporting activities were a front for unlawful religious meetings (conventicles), yet also declared that public sports such as bowling and tennis engendered crimes such as robberies and other misdemeanours and to breaches of the peace. The statute reads:-

“That where by reason of divers sundry Licenses heretofore granted to divers Persons, as well within the City of London and the Suburbs of the same, as also in divers other Places within your Highness Realm, for the having, maintaining and keeping of Houses, Gardens and Places for Bowling, Tennis, Dicing, White and Black, Making and Marring, and other unlawful Games prohibited by the Laws and Statutes of this Realm, divers and many unlawful Assemblies, Conventicles, Seditions and Conspiracies have and been daily secretly practised by idle and misruled Persons repairing to such Places; of the which, Robberies and

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oftentimes committed and done in divers parts of this realm, to the great inquieting and trouble of many good and well-disposed persons, and the importune loss of their goods, which plays in their said offences be daily supported and savoured by the governors and occupiers of divers houses, tenements, gardens, and other places, where they use and occupy their said ungracious and incommendable games: Our sovereign lord the King in consideration of the premises, by the advice of the lords spiritual and temporal, and the commons in the said parliament assembled, and by the authority of the same hath ordained, that after the feast of *Easter* next coming, no person, governor nor occupier of any house, tenement, garden, or other place within this realm, shall willingly suffer any person to occupy or play any of the said games called cloysh, kailes, half-bowl, hand in and hand out, or queckboard, or any of them, within any of their said houses, tenements, gardens, or any other place, upon pain to have the **imprisonment of three years**, and to forfeit and lose for every offence, xx. li.” Dan Pickering (ed) *The Statutes at Large, from the First Year of King Henry V to the Twenty-second Year of King Edw IV* (Charles Bathurst London 1762) vol III, at p 445.

many other Misdemeanours have ensued, to the Breach of your Highness Peace...”<sup>92</sup>

Other enactments dealing with breaches of the peace occasioned by public sporting activities include section 8 of *9 Anne c. 14 (1710)*. This statute provided for penalties for persons committing assaults on others on account of gaming in sports including horse racing.<sup>93</sup>

Each of these early statutes recognized, in their purposes, an observation that public exhibitions of sporting activity had propensity for violence, breaches of the peace, or impingement of public rights. In Britain, the several statutes between the years 1388 and 1845, a period of 457 years, declared various sports unlawful in their manner of practice and regulated the manner in which lawful sports and games could be conducted.<sup>94</sup>

Statutes from the reign of Charles II and through Hanoverian times moved away from general prohibition of public sporting activity; repealed various then existing proscriptions; and thence regulated the manner in which the publicly exhibited sport of horseracing only

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<sup>92</sup> —*The Statutes at Large, from the First Year of King Edw IV to the End of the Reign of Queen Elizabeth* (Charles Eyre and Andrew Strahan London 1786) vol II, at p 487.

<sup>93</sup> —*The Statutes at Large from the Tenth Year of the Reign of King Will III to the End of the Reign of Queen Anne* (Charles Eyre and Andrew Strahan London 1786) vol IV, at p 448. The section reads: “VIII. And for the preventing of such Quarrels as shall and may happen upon the Account of Gaming; Be it further enacted by the Authority aforesaid, That in case any Person or Persons whatsoever, shall assault and beat, or shall challenge or provoke to fight, any other Person or Persons whatsoever, upon Account of any Money won by gaming, playing or betting at any of the Games aforesaid, such Person or Persons assaulting or beating, or challenging or provoking to fight, such other Person or Persons upon the Account aforesaid, shall, being thereof convicted upon an Indictment or Information to be exhibited against him of them for that Purpose, forfeit to her Majesty, her Heirs and Successors, all his Goods, Chattels and Personal Estate whatsoever, and shall also suffer imprisonment without Bail or Mainprize, in the Common Gaol of the County where such Conviction shall be had, during the Term of two Years.”

<sup>94</sup> English statutes, such as *12 Ric 2 c. 6 (1388)*; *17 Edw 4 c. 3 (1477)*; *33 Hen 8 c. 9 (1541)*; and *1 Chas 1 c. 1 (1625)* commanded that several sports, such as football and tennis, then known, were unlawful and therefore prohibited. Some statutes during this period set specific penalties of imprisonment or fines for practising unlawful games: eg the statutes *11 Hen 4 c. 4 (1409)* and *33 Hen 8 c. 9 (1541)*. Statutes encouraged specific sports such as archery by regulating the times and places where such sports were allowed to be practiced and by controlling the manner in which sports were practiced: *3 Hen 7 c. 13 (1487)*; *11 Hen 7 c. 2 (1494)*; *3 Hen 8 c. 3 (1511-12)* [The Act reads: “All sorts of men under the age of forty years shall have bows and arrows, and use shooting; certain persons excepted, &c. (2) unlawful games shall not be used”]; *33 Hen 8 c. 9 (1541)*; *8 Eliz c. 10 (1566)*; *13 Geo 2 c. 19 (1740)* [which prohibited certain types of horse racing]; *15 Geo 2 c. 19 (1742)*; and *18 Geo 2 c. 34 (1745)* [concerning prohibitions on species of horse racing, and entitled, ‘An Act to explain amend and make more effectual the laws in being to prevent excessive and deceitful gaming and to restrain and prevent the excessive increase of horse races’].

might be lawfully conducted.<sup>95</sup> This new regulatory regimen was adopted in the British Dominions and preserved by the various States upon their independence. This regimen required that the publicly exhibited sport of horseracing was unlawful unless such sport first obtained the warrant of the Crown.<sup>96</sup>

The only other sports to have been made the subject of a regulatory regimen are the sports of boxing and motorcar racing. Prize-fighting, a form of boxing, has been declared unlawful in several jurisdictions at various times;<sup>97</sup> although never in the United Kingdom. New York and New South Wales legalized the sport of boxing by means of statutes: section 1710 of the New York Penal Law, Consol. Laws, c. 40;<sup>98</sup> New York Laws 1911, c. 779;<sup>99</sup> the Professional Boxing Control Act 1980 (NSW);<sup>100</sup> and the Boxing and Wrestling Control Act 1986 (NSW) [being “An Act to regulate the conduct of professional boxing; to constitute the Boxing Authority of New South Wales and to define its functions; to regulate the conduct of wrestling and amateur boxing contests...”].<sup>101</sup> Motorcar racing is regulated by means of enactments such as the Motor Racing Events Act 1990 (Qld) and the Mount Panorama Motor Racing Act 1989 (NSW), for example.

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<sup>95</sup> The British statutes *16 Chas 2 c. 7 (1664)*, and *9 Anne c. 14 (1710)*, and the nineteenth century acts *3 Geo 4 c. 41 (1823)* and *Gaming Act 1845, 8 & 9 Vic c. 109* repealed previous proscriptions on sports and thenceforth controlled the manner of play by instituting laws on gaming in sports only. The *Gaming Act 1850*, like the statutes *16 Car. 2 c. 7 (1664)*, *9 Anne c. 14 (1710)*, *13 Geo 2 c. 9 (1840)*, and *18 Geo 2 c. 34 (1845)*, as well as proscribing gaming in certain circumstances also controlled the manner in which the sport of horse racing, in particular, may lawfully be conducted.

<sup>96</sup> The laws espoused in these statutes, relating to horse racing, are preserved today in New South Wales in the Racing Administration Act 1998 (NSW). Subsequent legislation in Queensland, such as the Racecourses Act 1923 (Qld) (*14 Geo 5 No. 23*); the Racing Limitation Act 1946 (Qld) (*11 Geo 6 No. 3*); the Racing and Betting Act 1954 (Qld) (*3 Eliz 2 No. 54*); and the Racing and Betting Act 1980 (Qld) controlled the practice of the sport of horse racing also, requiring, in particular, the warrant of the executive government for such sport to be lawfully practiced.

<sup>97</sup> See eg *Kentucky Statutes (1899)*, sections 1284-1288 [These sections prohibit prize-fighting and boxing]; *Louisiana Act No 25 of 1890* [The Louisiana law prohibited prize-fighting]; and s 74 Criminal Code Act 1899 (Qld).

<sup>98</sup> This proscribed boxing, sparing and prize-fighting except where sanctioned by the New York State Athletic Commission.

<sup>99</sup> This Act established the New York State Athletic Commission.

<sup>100</sup> Repealed by the Boxing and Wrestling Control Act 1986 (NSW).

<sup>101</sup> To be repealed by the Combat Sports Act 2008 (NSW). The Combat Sports Act 2008 (NSW) will regulate the sports of “(a) boxing (or fist fighting) in any of its styles, (b) kick boxing in any of its styles, (c) any sport, martial art or activity in which each contestant in a contest, display or exhibition of that sport, art or activity is required to strike, kick, hit, grapple with, throw or punch one or more other contestants and that is prescribed by the regulations...”: s 3 Combat Sports Act 2008 (NSW). The Act received royal assent on 10<sup>th</sup> December 2008, though is not yet in force: s 2 Combat Sports Act 2008 (NSW).

## 7. Contemporary Statutes

In the United Kingdom, Australia, Canada, and the United States, there exists legislation proscribing specific sports in specific circumstances or otherwise controlling the manner in which publicly exhibited sporting events might be conducted. In the United Kingdom recent governments have legislated on football to control both the behaviour of spectators at football matches as well the behaviour of players: Football Spectators Act 1989 (UK) and the Football (Offences) Act 1991 (UK). For example, it would appear from section 3 of the Football (Offences) Act 1991 (UK) that both football players and spectators are prohibited from inciting racism during a football match. New South Wales has statutes on boxing<sup>102</sup> and motorcar racing,<sup>103</sup> and horse racing.<sup>104</sup> Queensland has statutes on horse racing<sup>105</sup> and motorcar racing,<sup>106</sup> for example. New York statutes require the license of the executive government, represented by the governor of the state, in sports such as horse racing and boxing: section 101 of the New York Racing, Pari-Mutuel Wagering and Breeding Law c. 47-A;<sup>107</sup> and New York Boxing Sparring and Wrestling Law c. 912 of 1920. The situation is the same in states such as New Hampshire, Kentucky and California, for example,<sup>108</sup> and in Canada.<sup>109</sup>

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<sup>102</sup> Boxing and Wrestling Control Act 1986 (NSW).

<sup>103</sup> Mount Panorama Motor Racing Act 1989 (NSW) and Motor Vehicle Sports (Public Safety) Act 1985 (NSW).

<sup>104</sup> Australian Jockey Club Act 1873 (Private Act) (NSW) and Racing Administration Act 1998 (NSW).

<sup>105</sup> Racing Act 2002 (Qld).

<sup>106</sup> Motor Racing Events Act 1990 (Qld).

<sup>107</sup> Section 101 establishes the New York state racing and wagering board in the following terms: "There is hereby created within the executive department the New York state racing and wagering board, which board shall have general jurisdiction over all horse racing activities. The board shall consist of three members to be appointed by the governor by and with the advice and consent of the senate." Following the establishment of license for the conduct of the sport of horse racing, s. 216 prohibits any racing not licensed: "Penalty for unlawful racing and betting. All racing or trials of speed between horses or other animals for any bet, stake or reward, except such as is allowed by this article or by special laws, is a public nuisance; and every person acting or aiding therein, or making or being interested in such bet, stake or reward is guilty of a misdemeanor and upon conviction is punishable by imprisonment in the county jail or penitentiary for a period of not more than one year; and in addition to the penalty prescribed therefor he forfeits to the people of this state all title or interest in any animal used with his privity in such race or trial of speed, and in any sum of money or other property betted or staked upon the result thereof."

<sup>108</sup> Section 284:6 of the New Hampshire Revised Statutes c. 284 [laws on horse and dog racing], and ss 3 and 11 of the New Hampshire Revised Statutes c. 285 [laws establishing a Boxing and Wrestling Commission for the State]; s 21 of the Kentucky Revised Statutes c. 229 [laws on boxing and wrestling]; and s 215 of the Kentucky Revised Statutes, c. 230 [laws on horse racing]; and in California, ss 18600-18618 ['the Boxing Act', which establishes the State Athletic Commission for California, with a board, the members of which are appointed by the Executive and Legislature of the State], and ss 19420-19421 [which establishes the California Horse Racing

The regulation of publicly exhibited sporting events appears to be piecemeal and reactive. There is no logical principle by which modern legislative regulation of publicly exhibited sports focuses only on such sports as boxing, horse racing and motorcar racing. There is no logical explanation for the reason why a horse race event is different to a football match, the former requiring legislation, the latter not. The only explanation must be that this is a historical anomaly. Given that the common law may proscribe public exhibitions of sporting contests on the grounds of public nuisance, it is curious that all sports do not necessitate a regulatory regimen similar to that existing for horseracing, boxing and motorcar racing.

## 8. The nature of publicly exhibited sporting events throughout the Ages

The particulars of a publicly exhibited sporting activity matter less in the eyes of the common law than the effects which the staging of such an activity has on public rights and the public peace. Whether the sport is the tournament or joust of the Middle Ages, horseracing of Hanoverian Britain or football or a triathlon event in contemporary times, the legal affect of the activity is the same. Each is culturally significant and laden with an arduous following. Each draws throngs of crowds. And each has potential to endanger the public peace, impact on public safety, and impinge on public rights. Geoffrey of Monmouth,<sup>110</sup> in his semi-fictional *History of the Kings of Britain*, written in the year 1136, gives an account of the events at King Arthur's plenary court at Whitsun:

“By this time, Britain had reached such a standard of sophistication that it excelled all other kingdoms in its general affluence, the richness of its decorations and the courteous behaviour of all its inhabitants. Every

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Board, with members appointed by the Governor of the State of California] of the California Business and Professions Code.

<sup>109</sup> See eg the Horse Racing Act, Revised Statutes of British Columbia 1996, c. 198; the Racing Commission Act, Statutes of Ontario 2000, c. 20; An Act respecting racing, Revised Statutes of Quebec, c. C-72.1; and An Act respecting the Régie des alcools, des courses et des jeux, Revised Statutes of Quebec, c. R-6.1.

<sup>110</sup> Geoffrey of Monmouth, who died in the year 1155, was probably a Benedictine monk of Monmouth. He studied and worked at Oxford and was attached to Robert, earl of Gloucester. He was appointed bishop of St Asaph in 1152. He wrote his *Historia Regnum Britanniae* circa 1136. See M Drabble (ed) *The Oxford Companion to English Literature* (5<sup>th</sup> edn OUP Oxford 1989) at p 386.



knight in the country who was in any way famed for his bravery wore livery and arms showing his own distinctive colour; and women of fashion often displayed the same colours...

Invigorated by the food and drink they had consumed, they went out into the meadows outside the city and split up into groups ready to play various games. The knights planned an imitation battle and competed together on horseback while their womenfolk watched from the top of the city walls and aroused them to passionate excitement by their flirtatious behaviour. The others passed what remained of the day in shooting with bows and arrows, hurling the lance, tossing heavy stones and rocks, playing dice and an immense variety of other games: this without the slightest show of ill-feeling. Whosoever won his particular game was then rewarded by Arthur with an immense prize. The next three days were passed in this way.”<sup>111</sup>

The popularity of these public exhibitions may be easily accounted for. The jousts and tournaments are the progenitor of our modern games; of our football and cricket matches, our motorcar grand prix, and our horseraces. The roar of the crowds, the echo of trumpets, the rush of competitors; these sounds are heard throughout the centuries and down to this day. Yet not only is the link between the former and latter sporting activities cultural. The link is also legal. The legal principles applying in the twelfth century, which principles promoted King Richard to regulate these tournaments and jousts, are the progenitor of the legal principles applying now.

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<sup>111</sup> N Wright (ed) *The Historia Regum Britanniae of Geoffrey of Monmouth* (Woodbridge 1985) at p 112; L Thorpe (tr) *The Historia Regum Britanniae of Geoffrey of Monmouth* (Harmondsworth 1966) at p 229-30.

## **Part 1    Public Rights and Natural Rights in Sport**

## Chapter 3

### Public rights at public spaces

The existence of a public nuisance depends on the existence of a public right.<sup>112</sup> A public nuisance can only exist where a public right is affected by some act or omission. Justice Garman in *City of Chicago v Beretta USA Corporation* refers to **a right common to the general public**: “[T]he first element that must be alleged to state a claim for public nuisance is the existence of a right common to the general public. Such rights include the rights of public health, public safety, public peace, public comfort, and public convenience...”<sup>113</sup> Lord Bingham of Cornhill in *R v Rimmington, R v Goldstein*,<sup>114</sup> preferred the term **common injury**. A court must declare a common injury; that is, a public right impinged by the act or omission of a defendant in declaring a public nuisance.

As explored in Part 3 of this thesis, in the context of sport, courts have declared that disparate publicly exhibited sporting events may impinge a number of public rights. Publicly exhibited sporting events have been declared public nuisances where they have:

- (i) obstructed the public in the exercise of a public right of way;
- (ii) inconvenienced the public in the exercise of a public right of way;
- (iii) caused annoyance or discomfort to the public in their exercise of a public right to quietude;
- (iv) caused annoyance or discomfort to the public in their exercise of a public right to comfort;
- (v) harmed public safety; and
- (vi) harmed public health.

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<sup>112</sup> See, further, the discussion at Part 2 of this thesis.

<sup>113</sup> 213 Ill 2d 351 (2004) at p 370.

<sup>114</sup> [2005] UKHL 63, [2006] 1 AC 459, [2005] 3 WLR 982.

At the beginning of this thesis a scenario was illustrated to highlight a probable conflict between a pecuniarily motivated publicly exhibited sporting event and the rights of private individuals to use the same public space. A publicly exhibited sporting event which makes use of a public beach, for example, may only be declared a public nuisance if there is a public right which such event impinges. Is there a public right to use of public spaces for leisure or recreation? Some jurisdictions recognize a public right to use of a public place. In *Copart Industries Inc v Consolidated Edison Co of New York Inc*, the Court of Appeals of New York stated the definition of public nuisance in the state of New York includes conduct that “interfere[s] with use by the public of a public place.”<sup>115</sup> Does our beachgoing family have a public right to use of a public beach for the purposes for which the public beach was created; namely, for recreation and enjoyment? Can such a right be obstructed or inconvenienced or disturbed by a publicly exhibited sporting event staged at the public beach where our beachgoing family are peaceably enjoying their time together?

The focus of this chapter concerns public rights at public spaces where members of the public habitually congregate or where the public have a pre-existing right of access, whether regulated or unfettered.<sup>116</sup> It is beyond the scope of this thesis to discuss the law on rights of access to places such as the foreshore, beaches, parks, and commons. Nor will this thesis address caselaw on trespass directly. Statutory rules play a large part in regulating the right of

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<sup>115</sup> 41 NY 2d 564 at p 568, 394 NYS 2d 169, 362 NE 2d 968 (1977) (Cooke J citing *New York Trap Rock Corp v Town of Clarkston* 299 NY 77 (1948) at p 80; *Melker v City of New York* 190 NY 481 (1908) at p 488; Restatement, Torts, nn preceding s 822, p 217). The definition proffered in *Copart Industries Inc v Consolidated Edison Co of New York Inc* was applied in *Hoover v Durkee* 212 AD 2d 839, 622 NYS 2d 348 (1995) at p 840 of the former report; *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91, 761 NYS 2d 192 (2003); and *Wheeler v Lebanon Valley Racing Corp* 303 AD 2d 791, 755 NYS 2d 763 (2003) at p 792 of the former report; and *City of New York v Beretta USA Corp* 315 F Supp 2d 256 (2004) at p 276.

<sup>116</sup> Note eg s 193 Law of Property Act 1925 (UK) which provides that members of the public shall have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 to 1898, or manorial waste, or a common, which is wholly or partly situated within a borough or urban district, provided that such right of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon. Note also s 2 of the Countryside and Rights of Way Act 2000 (UK) which grants rights of the public in relation to open countryside, commons, and any land above 600 metres from sea level, granting to any person the right to enter and remain on any access land for the purposes of open-air recreation provided that such person does not (i) drive or ride any vehicle; (ii) lights or tends a fire; (iii) bathes in any non-tidal water; (iv) engages in any operations of or connected with hunting, shooting, fishing, trapping, snaring, taking or destroying of any animals, birds or fish; and (v) intentionally remove, damage or destroy any plant, shrub, tree or root; amongst other restrictions.

access to, and rights of use at, national parks.<sup>117</sup> Such rules might disallow persons visiting national parks from picnicking or playing games within a national park. Further, local government by-laws may limit rights of use of parks and public reserves by time or by manner of use.<sup>118</sup> It is beyond the scope of this thesis to discuss all the statutory rules existing in the disparate common law jurisdictions that may impact on public use at national parks. Such statutory restrictions will not affect the nature of extant rights to use of public spaces; affecting only the manner in which a piece of public land may be used. As McTiernan J said in *Storey v The Council of the Municipality of North Sydney*: “It is of course not incompatible with the notions of public recreation and public enjoyment that certain restrictions, both as to time and as to the activity pursued, should be placed on the use made by members of the public of a piece of land.”<sup>119</sup>

Public land such as parks, beaches, and commons, for example, may be used for a variety of purposes and also may be restricted to certain purposes, yet may still be classified as a park or a public reserve dedicated to public use under legislation or consequent to deed. The question will never arise that the public do not possess a public right to use of public land. Only the nature of the public right may be qualified by the uses which are made of public

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<sup>117</sup> Note eg s 13 of the Crown Land (Reserves) Act 1978 (Vic) which provides that members of the public are prohibited from using national parks in Victoria, Australia, except as provided for in regulations or under the Act, and s 14(2) which provides that the Minister may not authorize an activity likely to impair the wilderness character of a wilderness area; and s 7.1 of the Provincial Parks Act of Ontario, Canada, RSO 1990 c P34, grants power to the Minister to establish fees and charges for entrance into provincial parks for persons, vehicles, boats or aircraft and fees for the use of provincial parks or of any facilities or services in provincial parks. Note also s 29 of the Park Act of British Columbia, Canada, RSBC 1996 c 344, which authorizes the Minister to make regulations respecting, eg, (i) killing, hunting, trapping, angling; (ii) the presence of pets, domestic animals; (iii) access to the park, conservancy or recreation area; (iv) regulating and controlling groups and the number of persons permitted to use facilities in, or to travel through, the park, conservancy or recreation area; and (v) establishing fees payable to the government for a park use permit or resource use permit.

<sup>118</sup> Note, eg, that pursuant to the local by-laws of the Noosa Shire Council the Council claims power to restrict the public in their use of public places such as gardens, recreation grounds, reserves, commons, foreshores, or of any land in the area dedicated to or vested in or under the control or management of the Council, or of which the Council is trustee, or in respect of which the Council is empowered to make local laws or any part thereof, including ‘canals’. Restrictions include: (i) restricting the public use by time of day; (ii) restricting use by setting aside places where specified sports or games may be played and places where specified sports or games shall not be played; and (iii) restricting the public use by placing an amenity, convenience or building in a park under the control of a person or club for the purpose of a game or sport or recreation, and by granting to a person or club the privilege or the exclusive use of such amenity, convenience or building or a specified part of a park not exceeding such an area as may be reasonably necessary for the playing of the game, or sport or recreation for which it is intended to be used. See rr 4(1), 15(4), 23(1), and 24(4), respectively, of the *Sunshine Coast Regional Council (Noosa Shire Council) Local Law No 5 – Parks, Reserves and Foreshores*.

<sup>119</sup> [1970] HCA 44, (1970) 123 CLR 574 at 577; *Randwick Municipal Council v Rutledge* [1959] HCA 63, (1959) 102 CLR 54 at p 88.

land. In *Module2 Pty Ltd v Brisbane City Council*, the Supreme Court of Queensland discussed the meaning of the term ‘park’ in reference to a resumption of land by the respondent City Council under sections 7 and 10(1) of the *Acquisition of Land Act* 1967 (Qld). The Court stated:

“Examples abound of internationally famed areas described as parks which are given over to a number of recreational or sporting uses. For example, Longchamp Racecourse is within the Bois de Boulogne. Regent’s Park has its famous zoo and Berlin’s Tiergarten also contains a zoo and other recreational facilities. In *Winnipeg City v St Vital Rural Municipality* [[1945] 1 WWR 161] it was held that a piece of land used entirely as a golf course was being used for ‘public park purposes’. In the course of his reasons, Bergman JA said [at pp 177-179]:

‘In my opinion a parks board is permitted to exercise common sense in carrying out its statutory powers; and, in working out a scheme of public parks, it may elect to devote one of its parks exclusively to golf, without thereby depriving it of its character as a public park... The best and most comprehensive definition of ‘park’ which I have found, and the one which I adopt as my own, is contained in *Northport Wesleyan Grove Camp Meeting Assn v Andrews* (1908) 71 Atl 1027 at 1030 (Maine), and is as follows: ‘A ‘park’ may be defined as a piece of ground set apart to be used by the public as a place for rest, recreation, exercise, pleasure, amusement, and enjoyment.’”

In the same case Dysard J observed [at p 180]: ‘The term ‘public park’ or ‘park’ generally connotes a portion of land of considerable extent, provided with the means and facilities of recreation and pleasure for the public at large without fee or charge. It may conceivably – and often does – include within its borders, baseball grounds, lawn bowling grounds, tennis courts,

and even golf courses.”<sup>120</sup>

The Court in *Module2 Pty Ltd* considered the definition of the term ‘park’ in *Butterworths Australian Legal Dictionary* noting that it refers to ‘land used for public health, recreation, enjoyment or other public purposes of a like nature’.<sup>121</sup> The Court concluded: “The definition [in *Butterworths Dictionary*] is drawn from the reasons of Hemmings J in *Wotton v Wingecarribee Shire Council & Anor* [(1989) 68 LGRA 38 at p 47] who considered that phrase to be consistent with the defined meaning of ‘public reserve’ in the Local Government Act 1919 (NSW) and views expressed in *Randwick Municipal Council v Rutledge* [[1959] HCA 63, (1959) 102 CLR 54].

In *Randwick Municipal Council v Rutledge*, Windeyer Justice said, discussing the meaning attributable to the term ‘public reserve’ in Australian jurisprudence:

“It is not necessary for all members of the public to have free access to all parts of the land at all times. It is not incompatible with a public reserve that persons can be excluded for misbehaviour or for any similar sufficient reason. It is not incompatible with a place being dedicated for public recreation and enjoyment that its use be regulated, and that persons using it must use it having regard to the particular form of recreation and enjoyment which takes place there – whether, for example, it be a golf links, tennis court, ocean beach, zoological gardens or rifle range. It is not incompatible with a public park or reserve that at particular times, as for example at night, the public are wholly excluded. And it is not necessarily incompatible with a place being a place for public recreation and enjoyment that certain persons are allowed access at times when the general public is excluded or are allowed into parts where the general public cannot go – for example research students may have special advantages in a public library, scientists in a public museum and so on. But, as Walsh J. said in the Supreme Court, ‘the enjoyment of special privileges by members of the club, differing in kind from any

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<sup>120</sup> [2006] QSC 71 at paras [27] and [28].

<sup>121</sup> Nygh and Butt (eds) *Butterworths Australian Legal Dictionary* (Butterworths Sydney 1997).

which the general public enjoy, is to be regarded as a material consideration in ascertaining whether the land is used for public purposes' (1959) 4 LGRA at p 119.”<sup>122</sup>

Menzies J stated similarly:

“...[L]and open to common and general use for... public health, recreation, enjoyment or the like... does not mean that every member of the public must have an unfettered right to resort to every public reserve and to use the facilities there provided as and when he chooses free of charge. There are public reserves of a character which requires close regulation of their public use, eg botanical gardens or a sports arena. Nor does it mean that no members of the public should have special privileges for the use of the reserve; eg to admit botanists to botanical gardens at times when they are closed to the general public would be consistent with their use as a public reserve. Nor is an admission charge inconsistent with land being used as a public reserve. What is required in every case where the question is whether land is used for a public reserve is a survey of all that happens upon the land to determine whether it is in fact set apart and used for the general welfare...”<sup>123</sup>

Thus, the Randwick Racecourse in Sydney, used for horse racing under the exclusive management of the Australian Jockey Club, was appropriately regarded as a place of public recreation albeit that the public had no access as of right except upon race days, and that on race days those resorting there have to pay to enter.<sup>124</sup>

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<sup>122</sup> *Randwick Municipal Corporation v Rutledge* [1959] HCA 63, (1959) 102 CLR 54 at p 89 (Windeyer J).

<sup>123</sup> [1959] HCA 63, (1959) 102 CLR 54 at p 65 (Menzies J).

<sup>124</sup> Menzies J concluded his analysis by stating: “...[I]t is beyond question that at all times material Randwick was, and was conducted as, a public racecourse, notwithstanding that it was open to racegoers only when meetings were held some twenty-seven times a year. Hardie J decided that the land was not used for the purpose of public recreation on two grounds: (1) because it was not used or available for use by the public as of right, and (2) because taking everything into account, the land was not used for the purpose of public recreation. For the reasons I have already given, I consider that the facts that, except upon race days, the public has no access as of right to the racecourse, and that on race days those resorting there have to pay to enter, do not establish that the racecourse was not used for public recreation or enjoyment. Furthermore, the finding that the racecourse was not used for the purpose of public recreation because of the substantial restrictions upon the attendance of the public and the special position of the Australian Jockey Club and its members was, for the reasons I have given, in error.” [1959] HCA 63, (1959) 102 CLR 54 at p 67 (Menzies J).



The foregoing analysis of the legal definition of the terms ‘park’ and ‘public reserve’ demonstrates that a wide variety of public places are properly and lawfully designated as park. This chapter explores the nature of the public’s right to recreation. The nature of the public’s rights to use of parks may be qualified by the purposes to which a public park is made available. A public right to recreation may exist in respect of a park used as a Municipal Zoo, a park set aside exclusively for the use of the game of golf, or a park open to a variety of sporting and leisure activities. This thesis does not argue that a public right to recreation cannot exist at a Zoo or at a park set aside exclusively for the game of golf, only that the public right to recreation at such places is qualified by the classification of the park as a Zoo or as a Golf Course. This thesis focuses principally on the nature of public rights existing at public places where publicly exhibited sporting events are likely to be staged. Such places include public beaches, public parks, village and town greens, and commons.

## 1. The meaning of public place

Public land is a broad term used in legislation, such as for example in the Lands Acts in Australia and Canada, and delineates all Crown or State land which is preserved or reserved for public use. Pursuant to the section 3 of the Land Act 1994 (Qld), for example, public use land is defined to mean “land dedicated to public use by a plan of subdivision.” Crown land in Queensland dedicated to the public includes all land reserved for a community purpose and comprises ‘gardens’, ‘open spaces’, ‘parks’, beaches and the foreshore.<sup>125</sup> Under section 1 of the Public Lands Act of Ontario, Canada, RSO 1990 c P43, ‘public lands’ includes lands designated as Crown lands; and s 24(1) provides that ‘lands’ means public lands and includes public lands covered with water. All Crown lands are public lands: section 38(2) RSO c P43. Respecting public reserves, section 3 of the Ontario Act provides that: “Where 25 per cent or more of the frontage of lands fronting on a body of water are public lands, lands comprising at least 25 per cent of the frontage and to such depth as the Minister considers appropriate shall be set apart for recreational and access purposes and,

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<sup>125</sup> See Sch 6 definition ‘public purpose’; Sch 1 and s 23 Land Act 1994 (Qld).

where less than 25 per cent of the frontage of lands fronting on a body of water are public lands, all public lands fronting thereon and to such depth as the Minister considers appropriate shall be set apart for such purposes.” And section 63 provides that: “Any part of the public lands that is a beach and is used for travel by the public is not by reason only of such use a highway within the meaning of any Act.” Pursuant to the Local Government Act 1993 (Vic) public places over which local authorities exercise management include parks where ‘park’ is defined, so far as relevant, to mean ‘an area of open space used for recreation, not being bushland’. Under the Local Government Act 1993 (Vic) local authorities are accorded the management of public parks and, pursuant to section 36G must: (a) encourage, promote and facilitate recreational, cultural, social and educational pastimes and activities, and (b) provide for passive recreational activities or pastimes and for the casual playing of games, and (c) improve the land in such a way as to promote and facilitate its use to achieve the other core objectives for its management.<sup>126</sup> And in the Australian state of New South Wales, a public place is defined under section 4 of the Major Events Act 2009 and section 3 of the Law Enforcement (Powers and Responsibilities) Act 2002 as: ““a place (whether or not covered by water), or part of premises, that is open to the public or is used by the public, whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons” and includes a road or road related area.

It is, therefore, not inappropriate to state that public places connote all public beaches, the seashore, the foreshore, public parks, public reserves, lakes, rivers, and canals, and that such public places are set aside for public use viz for rights of way or for rights of recreation if founded at common law. The sea and seashore itself may be regarded as a public place, particularly so because the public have a right of navigation on the sea.<sup>127</sup> In *Commonwealth of Australia v Yarmirr*, discussing a claim for native title rights in respect of the sea and foreshore, the High Court of Australia noted that: “The successive assertions of sovereignty over what now are territorial waters, without any further or other act of the executive or

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<sup>126</sup> See also *Ballerini v Berrigan Shire Council* [2004] VSC 321 (1 September 2004)

<sup>127</sup> *Orr-Ewing v Colquhoun* (1877) 2 App Cas 839; *Denaby & Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171 at pp 198-9 (Fletcher Moulton J); *Gann v Free Fishers of Whitstable* [1865] 11 HL Cas 192 at pp 207-08 (Lord Westbury); *Iveagh v Martin* [1961] 1 QB 232 at 272; and *The Swift* [1901] P 168; *Commonwealth of Australia v Yarmirr* [1999] FCA 1668 at para [548]; *The Commonwealth v Yarmirr* [2001] HCA 56 at paras [96]-[98], (2001) 75 ALJR 1582 at p 1604.

legislature, brought with them, and gave to the public, the public rights [of navigation and of fishing].”<sup>128</sup> The people generally exercise a right to swim, bath, body surf, surf, dive, snorkel, wade, float, stand, sit and lay in the surf and waters at the seashores, which activities have been held to be concomitant with the right of navigation.<sup>129</sup> On beaches and in parks, reserves and commons, the people generally exercise their rights of use of a public place by running along the beach or in the park, reserve, or common, by jogging, by walking, by sitting, by laying, by kite flying, or by picnicking at such places. The people might also practice yoga, play catch with a ball, play cricket, kick a football, or read a book. All of these activities might be appropriately summarised as a public right to recreation. The existence of this right is discussed below.

## 2. The context in which a public right to recreation might arise

Whilst several major sporting events, such as triathlons, marathons and fun runs, comprise of amateur athletes in these respective events, and members of the public generally, other events that are staged in the public highways, public beaches, public parks, and other public places, are professional events involving only elite professional athletes who use a public place to ply their trade, earning tens of thousands of dollars as a result of the competition. These elite athletes, concomitant with the sports association of which they are members, and companies sponsoring the competition, appropriate a public place, such as a part of a beach or a part of a park, in order to make money for themselves.

Whether a publicly exhibited sporting event staged at a public place comprises of amateur or professional athletes, or a mixture of both, in the process of using a beach or a park for their sports event they may prevent or obstruct the public from using the place appropriated, or otherwise inconvenience or cause discomfort to the public in their use of these public places. The Noosa Triathlon, for example, utilises a public park for the storage of bicycles and for the transition from the swimming, bicycling and running legs, and the beach and canals are

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<sup>128</sup> *The Commonwealth v Yarmirr* [2001] HCA 56 at para [99], (2001) 75 ALJR 1582 at 1605.

<sup>129</sup> *Borough of Neptune City v Borough of Avon-by-the-Sea* 294 A2d 47 at pp 54-55 (1972); *Opinion of the Justices* 365 Mass 681 at p 686, 313 NE 2d 561 at p 566 (1974). cf *Blundell v Catterall* (1821) 5 B & Ald 268, 100 ER 1190; and *Brinckman v Mately* [1904] 2 Ch 313. See further discussion at n 141, below.

appropriated for the swimming leg. Similar scenarios exist at other noteworthy triathlon races, such as at Port Macquarie, in New South Wales, which is home to the Australian Ironman Triathlon. There is no separate legislative Act of either the Queensland or New South Wales Parliaments authorising the appropriation of public places for these private purposes. The Windsor Triathlon is run in Windsor, England. The race uses the Thames for the swimming leg, preventing free access along the Thames to boats, a public park for the storage of bicycles and for the transition from one leg to another, and the public roads and footpaths for the bicycle and running legs. The route of the run uses the Eton High Street, the Eton Windsor Bridge, and the public road up alongside the Castle wall to the top of the hill in Windsor near the Guildhall. During the race the public road and parts of the public footpath is cordoned off to the public with metal barriers, gates and traffic cones. The public right to free and uninhibited access to and use of the roads and footpaths, for passage, as well as the public park for recreation, is obstructed during the running of the event by these barriers and also by the crowd which gathers to observe the participants in the race. A similar situation exists at the London Triathlon. That race is held at Victoria Dock in the east of London and utilises public streets, which are completely shut off to the public, for the cycle and run legs of the race. Public streets are also usually blocked off to the public during marathon races which take place annually in many of the world's major cities. There is no specific legislation of the United Kingdom Parliament which authorises these enclosures for the purposes of conducting triathlon competitions. Triathlon events involve the appropriation of parts of the sea and seashore, or lakes, or rivers, for the swimming leg of the race, parts of the beach, or foreshore, or public parks, for the transition from the swim to the bicycle leg, and the public roads and parks, for the cycling and running legs. The public rights of way, of navigation, and of recreation, if founded at common law, may be obstructed or interfered with.

Other commercial sporting events, such as Surf Lifesaving competitions, Ironman events, surfing competitions and volleyball competitions, use public beaches and the surf. These events are generally conducted on a weekend so as to maximise revenue from television sponsorship for the sporting association holding the competition. In Australia, all along the coastal beaches, Ironman sports and Surf-Lifesaving competitions, as well as triathlon races, mentioned above, involve open-water swimming, kayaking, and rowing on the sea and

seashore, and running along the beach. Surfing competitions also take place on the public beaches; as do beach-volleyball competitions. The events are popular, drawing considerable crowds, and are televised live on national television. The Australian Surf Lifesaving Championships at Kurrawa Beach on the Gold Coast in 2005 drew a crowd of 18,000 spectators on the beach.<sup>130</sup> 25,000 spectators crowded Coogee Beach in Sydney for the final of the Nutri-Grain Ironman Series which saw the winning competitors secure \$50,000 in prize-money.<sup>131</sup> 8,000 spectators witnessed the Quicksilver Pro Surfing competition at Snapper Rocks on the Gold Coast in Queensland in March 2005.<sup>132</sup> And 100,000 spectators were reported on Huntington Beach in California to witness the US Open Surfing Title.<sup>133</sup> These beach and surf sports can be conducted over an extensive area. Beaches at the Gold Coast, in Queensland, often stage national championship events in Ironman endurance and surfing. The *Coolangatta Gold* is a 46-kilometre event that comprises of ski, run, board, and swim legs, using several beaches from Surfers' Paradise to Greenmount and back again.<sup>134</sup> The race was held between 1984 and 1992 and annually from 2005.<sup>135</sup> On such occasions stands are erected on the beach and competitors race along the beach and in the surf at several beaches.

Multisport entertainment 'festivals' are an increasing occurrence in many cities and towns. For example, the *Gravity Games H2O* is a multisport event involving the sports of wakeboarding, free motocross, and skateboarding, amongst others.<sup>136</sup> In 2006 the event was held in the public parks along the Swan River in Perth, Western Australia, and in the river itself. The parks were cordoned off with large barriers each carrying advertisements aimed at

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<sup>130</sup> P Hintz 'High Drama as Surf Boats Cop a Pummelling' *The Courier-Mail* (Brisbane Queensland Australia, 21 March 2005) at p 3.

<sup>131</sup> P Hintz 'Back to Back Crowns for Iron King and Queen' *The Courier-Mail* (Brisbane Queensland Australia, 31 January 2005) Sport at p 8.

<sup>132</sup> C Murnieks 'Fanning Returns in Rare Form' *The Australian* (Australia, 12 March 2005) at p 57.

<sup>133</sup> —'Taj, Chelsea Grab US Titles' *Sunday Mail* (Australia, 8 August 2004) at p 64.

<sup>134</sup> —'Support Expected for Coolangatta Gold Return' *Australian Broadcasting Corporation News* <<http://www.abc.net.au/news/australia/qld/goldc/200506/s1382014.htm>> (14 June 2005).

<sup>135</sup> <<http://www.goldcoast.com.au/sport/coolangatta-gold.html>> (1 July 2008).

<sup>136</sup> <<http://www.gravitygamesh2o.com/>> (22 April 2008). Gravity Games is a multi-sport competition originating from Providence, Rhode Island, with Winter and Summer adaptations. These feature a variety of extreme sports such as Aggressive Inline skating, skateboarding, Freestyle Motocross, BMX freestyle cycling (during the summer) and snowboarding (during the winter). The Games are jointly owned through a strategic partnership between Primedia (NYSE: PRM), a sports marketing group (NYSE: IPG), and NBC Sports (a US TV company). The event also incorporates music into the festivities concomitant with the sports activities.

youth. Large marquees and loudspeakers were installed in the parks. The *X Games* is also a publicly exhibited extreme sports event with both a Winter festival held in Aspen, Colorado, and a Summer festival held in Los Angeles.<sup>137</sup> Winter sporting activities staged include skiing, snowboarding and snowmobile driving. Summer sports comprise of skateboarding, motocross motorcycle driving, and freestyle BMX cycling.

Each of these publicly exhibited sporting events may be declared a public nuisance at common law by obstructing the public in the exercise of their public right of way on the highway, in the exercise of their public right of navigation or of fishing on the sea; by inconveniencing the public in the exercise of these public rights; or by causing discomfort to the public in the exercise of these rights. The public may also have a public right to use of public spaces such as beaches, the sea, the seashore, and parks, and commons, for their recreation. A publicly exhibited sporting event which obstructs the public or inconveniences the public at a public beach, park or common may create a public nuisance. The public right impinged upon at beaches, parks and commons is the public right to recreation.

### 3. Public rights at public places by analogy to the public right of way

Public rights at public places such as public beaches and public parks are analogous to the public right of way discussed in Chapter 11 of this thesis. There is little or no factual difference between a sports association appropriating a public place, such as a beach, for their own use for a limited duration, and the facts of *R v Cross*,<sup>138</sup> where a company operating a stage coach service used the public road at Charing Cross in London. The only question which is raised is whether a public right to use of a beach exists. Yet in both circumstances, a private entity, an incorporated body, makes use of a public place – either a road or a beach – for their own financial motives, and in that process obstructs, or at the very least interferes with, the public in the exercise of public rights. The appropriation of a public place which causes obstruction or inconvenience or discomfort to the public in the exercise of their public right at that public place is a public nuisance at common law.

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<sup>137</sup> <<http://espn.go.com/action/xgames/>> (22 April 2008).

<sup>138</sup> (1812) 3 Camp 244.

Common law public nuisances may arise not only on public roads, as discussed in more detail in Chapter 11 below, but may also, and just as importantly, be created at any public place, such as the sea and the foreshore. In *Southport Corporation v Esso Petroleum Co Ltd*,<sup>139</sup> on the question of nuisance, Lord Justice Denning was of the opinion that it was a public nuisance to discharge oil into the sea in circumstances where it is likely such oil will wash up on the shores and beaches thereby obstructing public rights and causing discomfort to the public in the exercise of their rights to use of the beaches. Lord Justice Denning's exact words were: "Applying the old cases to modern instances, it is, in my opinion, a public nuisance to discharge oil into the sea in such circumstances that it is likely to be carried onto the shores and beaches of our land to the prejudice and discomfort of Her Majesty's subjects. It is an offence punishable by the common law."<sup>140</sup> Highways and public places such as beaches or parks, may be regarded one and the same thing in public nuisance suits; particularly so because the public exercises rights over public places such as the sea, beaches, and parks, similarly to their exercise of rights to travel along the public highways.

The public have public rights with respect to the sea and seashore. All waters which are tidal and in which navigation is possible are subject to a public right of navigation, which is a public right of way: *Orr-Ewing v Colquhoun*.<sup>141</sup> This right of navigation may in fact be more extensive than the public right of way in respect of the highway, as acknowledged by Fletcher Moulton J in *Denaby & Cadeby Main Collieries Ltd v Anson*: "That the public have a right to the free use of the sea for the purposes of navigation has been unchallenged law from the earliest times. It has frequently been enunciated in the form that the sea is a public highway, and that ships have the right eundi, redeundi, et morandi over every part of it, no matter to whom the soil lying thereunder may belong... In some respects, perhaps, the public rights of user of the sea for navigation are from the nature of the case more extensive than in the analogous case of a highway. For instance, it is essential to navigation that there should be a free right of anchoring or otherwise securing in position the navigating vessel,

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<sup>139</sup> [1954] 2 QB 182, [1954] 2 All ER 561 (Court of Appeal).

<sup>140</sup> [1954] 2 QB 182, [1954] 2 All ER 561 (Court of Appeal) at p 571 (Lord Denning). Although the judgment of the Court of Appeal was reversed by the House of Lords, [1955] 3 All ER 864, Lord Radcliffe did say he agreed with Lord Justice Denning's views on the question of nuisance.

<sup>141</sup> (1877) 2 App Cas 839; and *Denaby & Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171 at pp 198-9 (Fletcher Moulton J)

and there is nothing strictly analogous to this in the case of a highway.”<sup>142</sup> The right includes the right to anchor, to remain for a reasonable time, to load and unload, and to moor or fix temporary moorings in certain circumstances.<sup>143</sup> And so a publicly exhibited sporting event which obstructs the public right of way on the highway may likewise obstruct the public right of way on the sea (where the sporting event involves use of the sea for such activities as surfing, triathlon, open water swimming, kayaking, the use of surf skis, and rowing boats, etc) or the foreshore, because the public have rights of passage in respect of the foreshore incident to the right of navigation.

But are there other public rights at public beaches and public parks capable of impingement by a publicly exhibited sporting event? Is there a public right to recreation? A member of the public may use a footpath for jogging or walking for his or her own health and wellbeing in similar manner to a park or a beach. Just as a sport may create a public nuisance by appropriating the public roads for exclusive use and personal profit, so too, a sport may create a public nuisance by appropriating for exclusive use and personal profit a public beach, or a part of that beach, or a public park, or part of that park, or any other place where the public exercise public rights.

#### 4. The *Blundell v Catterall* blunder?

In *Blundell v Catterall*,<sup>144</sup> the Court of King’s Bench in 1821 by majority took a very narrow view of the public’s rights over the foreshore – that part of the beach which is alternatively covered with water and left dry by the flux and reflux of the tides; the area technically defined as bordered by the mean high and low water marks.<sup>145</sup> The majority rejected the

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<sup>142</sup> [1911] 1 KB 171 at pp 198-9.

<sup>143</sup> See eg *Gann v Free Fishers of Whitstable* [1865] 11 HL Cas 192 at pp 207-08 (Lord Westbury); *Iveagh v Martin* [1961] 1 QB 232 at 272; and *The Swift* [1901] P 168; *Commonwealth of Australia v Yarmirr* [1999] FCA 1668 at para [548].

<sup>144</sup> (1821) 5 B & Ald 268, 100 ER 1190.

<sup>145</sup> *Blundell v Catterall* (1821) 5 B & Ald 268, 100 ER 1190; *Scrutton v Brown* (1825) 4 B & C 495, 107 ER 1140; *Attorney-General v Chambers* (1854) 4 De GM & G 206, 43 ER 486; *Stewart v Turney* 237 NY 117 (1923). See T Bonyhady *The Law of the Countryside, The Rights of the Public* (Professional Books Abingdon 1987) at p 5; ‘Waters and Watercourses – Right of Public Passage Along Great Lakes Beaches’ (1933) 31 Mich LR 1134 at fn 3 and accompanying text.



plaintiff's claims that there was a public right of way over the foreshore when dry; that members of the public had a right to bathe in the sea; and that in order to exercise that right members of the public were entitled to cross the foreshore to reach the sea and could also remain on the foreshore for a reasonable time. Instead, the majority opinion suggested that the public's rights over the foreshore are only a right of navigation and a right to fish, and actions ancillary to those rights of navigation and fishing.

In *Blundell v Catterall*, a wealthy baron sued the owners of a neighbouring summer resort hotel who rented out bathing machines. The case concerned an action for trespass for breaking and entering the plaintiff's land. Boys, employed to push the bathing machines through the surf, sometimes walked in front of the plaintiff's property. He contested their right to do this stating that although he held his private land subject to rights of navigation, he did not hold subject to rights of public passage or rights of bathing. The defendant was charged with passing over, tearing up, damaging the sand, gravel, and soil of the seashore by walking, riding horses and wheeling bathing machines on the soil of the seashore.<sup>146</sup> The facts were such that no bathing machines had been used upon the shore at the plaintiff's estate before the establishment of the hotel in 1815, but it had been the custom for the public to cross it on foot for the purposes of bathing.

The defendant contended for a common law right for all the king's subjects to bathe on the seashore, and to pass over it for that purpose on foot, and with horses and carriages. But by majority opinion the court refined the defendant's claim. The question, which the court determined was to be decided, was the narrower question thus stated by Holroyd J:

“The question put in this case for our opinion, is the general question, whether there is a common law right for all the King's subjects to bathe in the sea, and to pass over the seashore for that purpose, on foot and with horses and carriages. But coupled with the facts stated in the case, the question really is, whether there is a common law right in all the King's subjects to do so in the locus in quo, though the soil of the

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<sup>146</sup> The term ‘seashore’ is of equivalent meaning to the term ‘foreshore’: *Attorney-General v Chambers* (1854) 4 De G M & G 206, 43 ER 486; *Littlefield v Littlefield* 28 Me 180 (1848). See ‘Waters and Watercourses – Right of Public Passage Along Great Lakes Beaches’ (1933) 31 Mich LR 1134 at fn 3 and accompanying text.

seashore, and an exclusive right of fishing there in a particular manner (namely, with stake nets), are private property belonging to a subject, and though the same have been a special peculiar property from time immemorial.”<sup>147</sup>

The court thus based its decision on the narrower ground of whether a public right to bathing at a seashore owned by a private individual exists at common law. Indeed, Holroyd J stated: “My opinion, therefore, on this case, will not affect any right that has been or can be gained by prescription or custom.”<sup>148</sup> The majority held that the defendant could not claim a right to bathe in the sea as a common law right because no authority except *Bracton* and a case in *Lord Raymond* which Justice Holroyd says is “a very loose and inaccurate note”<sup>149</sup> without further elaborating, supported such claim. The majority, in contradistinction to Best J dissenting judgment, did not rely on the authorities as establishing a general right of way on the sea and seashore, which general right of way subsumes more specific rights such as a right to navigation, a right to fish, and a right to bathe or swim, &c. The majority cited Hale’s *De Jure Maris* and *De Portibus Maris* as authority only for a public right of navigation and a public right of fishing and not as authority of a general public right to use of the sea and the seashore for all lawful purposes.<sup>150</sup> Bayley J stated: “It is material to distinguish between the different descriptions of rights which the public may have: a right of navigation, which is for the general benefit of all the kingdom; and a right of fishing, which tends to the sustenance and beneficial employment of individuals; but it does not thence follow that they have also the right of bathing.”<sup>151</sup> And Holroyd J stated: “And if the right of bathing, and of the incident foot and carriage way claimed for that purpose, cannot be established under such a general claim of right as I have before stated, it can only be supported under the specific claim of a public right of bathing, and of carriageway as incident thereto... And then, I ask, where is such a right of bathing on the seashore, where it has become private

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<sup>147</sup> *Blundell v Catterall* (1821) 5 B & Ald 268, 100 ER 1190, at p 288 of the former report (Holroyd J). And see at pp 306-307 (Bayley J).

<sup>148</sup> *ibid* at p 289. Prescription at common law is the establishment of a claim founded on a long or indefinite period of uninterrupted use: See *Dalton v Angus* (1881) 6 App Cas 740 at p 773; *Mann v Brodie* [1885] 10 App Cas 378 at p 386.

<sup>149</sup> *ibid* at page 301.

<sup>150</sup> *ibid* at pp 294-98 (Holroyd J) and at pp 304-305, pp 308-310 (Bayley J); cf the methodology of Best J at pp 278-79.

<sup>151</sup> *ibid* at pp 304-305

property, and may immemorially have been so, and of a carriage way for that purpose as incident thereto, when sought for, to be found as existing at common law, independently of usage and custom...?”<sup>152</sup>

At the conclusion of the judgments Abbott CJ stated shortly what the decision of the court was: “But where one man endeavours to make his own special profit by conveying persons over the soil of another, and claims a public right to do so, as in the present case, it does not seem to me that he has any just reason to complain, if the owner of the soil shall insist upon participating in the profit, and endeavour to maintain his own private right, and preserve the evidence thereof.”<sup>153</sup> The public thus have no right of way to bathe at the seashore of a private owner. The littoral owner has exclusive private rights over his land.

The holding in *Blundell v Catterall* may seem distinguishable on its facts and have little bearing on whether public rights exist at public places such as public beaches or public parks; whereby such public rights might be impinged upon by another. But the problem, or perhaps the blunder, is that subsequent decisions appear to have reaffirmed *Blundell v Catterall* on broader terms. The decision in *Blundell v Catterall* was followed some 78 years later in *Llandudno Urban District Council v Woods*,<sup>154</sup> when Cozens-Hardy J remarked that the littoral owner had “prima facie a right to treat every bather, every nursemaid with a perambulator, every boy riding a donkey, and every preacher, on the shore” as a trespasser. In that case, the plaintiff local government had a lease of the foreshore granted by the Crown for a term of 21 years. The court viewed the lease as granting private proprietary rights over the foreshore.

Five years later still, *Blundell v Catterall* was again reaffirmed when the trustees to an infant Marquis enjoined bathing at the foreshore of his estate on the Isle of Thanet by schoolboys using his estate as a summer camp. Although the court followed *Blundell v Catterall*, the court appears to have gone further than the ratio decidendi of *Blundell v Catterall*, holding, as is stated by the headnote, that the public have no common right to use the foreshore to pass or

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<sup>152</sup> *ibid* at pp 299-300.

<sup>153</sup> *ibid* at p 316 (Abbott CJ).

<sup>154</sup> [1899] 2 Ch 705.

repass thereon for the purpose of bathing in the sea, whether the foreshore is the property of the Crown or of a private owner. Vaughan Williams LJ stated:

“[T]he Crown holds the foreshore upon the terms that it must recognize the jus publicum, whatever it may be, over the foreshore, and do nothing inconsistent with that jus. This jus, as regards the rights of navigation and of fishing – the right to use the foreshore for those purposes – has a great deal of authority to support it, but except as regards those rights, and in so far as any act of the Crown would defeat those rights, the Crown has beneficial ownership of the foreshore, and a private person, such as the present plaintiffs, would stand in the same position... *Blundell v Catterall*... is conclusive of the present case.”<sup>155</sup>

Yet, in consideration of the facts of this case, the headnote summary is wrong, and the words of Vaughan Williams LJ must be regarded as obiter dictum, for the foreshore in question in the case was not Crown land, but was private property, as was the case in *Blundell v Catterall*. *Brinckman v Matley* cannot be held to have decided anything on point of law further than what was decided in *Blundell v Catterall*, and so the question as to whether the public has a public right to recreation at the seashore where the seashore is Crown land and not owned privately, remains an open question which has yet to be determined in a court of law.

The facts of *Brinckman v Matley* were almost identical to *Blundell v Catterall*, although occurring 83 years apart. In *Brinckman v Matley* the manor, including the foreshore, of Minster on the Isle of Thanet was granted to the plaintiff's predecessors by Royal Charter on 24 December 1611. In July 1903 the defendant, who was headmaster of St Saviour's Elementary School in Middlesex, with about 200 schoolboys, camped on the cliffs above Joss Bay which formed part of the foreshore on the plaintiff's estate. The defendant remained in the camp with the boys who were under his care and control for two months, without the consent of the plaintiff and entered upon the foreshore and bathed in the sea.

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<sup>155</sup> *Brinckman v Matley* [1904] 2 Ch 313 at p 321 (Vaughan Williams LJ).

A curious anomaly appears to have arisen at common law in England; namely, that, as stated per curiam obiter in *Alfred F Beckett Ltd v Lyons*, “It is well known that in relation to the English foreshore many activities, including walking thereon, bathing therefrom, and beachcombing, have been generally tolerated by the Crown as owner of the foreshore, without at any time giving rise to any legal right in the public to continue them.”<sup>156</sup> Yet does not a public right to use of land arise from long uninterrupted use by virtue of an implied dedication of land?<sup>157</sup> Russell LJ, in *Beckett v Lyons*, does not consider the process by which public rights may be claimed by longer user of a public space as of right.

The error of the courts approach in *Beckett v Lyons* can be seen in the following dicta of Harman LJ, where his Lordship, after citing from Lord Lindley in *Gardner v Hodgson’s Brewery* said: “If it be clear that the usage has long been practised under a claim of right; then the court will be astute to find a legal origin for it; but where another explanation is equally possible, this principle does not prevail. Here, I think, toleration is a sufficient explanation.”<sup>158</sup> Dillon LJ in *Mills v Silver*, respectfully disputed that approach,<sup>159</sup> although he refused to overrule and concluded somewhat lamely: “...in the context of *Beckett v Lyons* as a whole, I take the decision to come down to this; that it is well-known that public rights in law over the foreshore are very limited and that everything else done on the foreshore is by tolerance or licence of the Crown...”

Contrary to *Blundell v Catterall* and *Beckett v Lyons*, there is a plethora of precedents to support a claim as of right based on long uninterrupted use.<sup>160</sup> We know that on the foreshores of England bathing has occurred since at least the year 1821 when the matter was first litigated

<sup>156</sup> [1967] Ch 449 at p 475 (Russell LJ).

<sup>157</sup> *Turner v Walsb* (1880) 1 LR (NSW) 83, affirmed by the Privy Council ((1881) 6 App Cas 636) held that long continued user of a way by the public over land whether of the Crown or of a private owner, gives rise to a presumption of dedication, in the absence of anything to rebut it. See also *R v Lloyd* (1808) 1 Camp 261, 170 ER 950; *Poole v Huskinson* (1843) 11 M & W 827, 152 ER 1039; *R v Inhabitants of East Mark* (1848) 11 QB 877 at p 882 (Lord Denman CJ), 116 ER 701; *Cubitt v Maxse* (1873) LR 8 CP 704 at p 715 (Brett J); *Mann v Brodie* [1885] 10 App Cas 378; *Hunsinger v Town of Simcoe* [1946] 2 DLR 632, [1946] OR 203, [1946] OWN 189 (CA), affirmed [1948] 3 DLR 224 (SCC); *Foothills No 31 (Municipal District) v Stockwell* (1985) 39 RPR 82 at p 84; [1986] 1 WWR 668; 41 Alta LR (2d) 184 (Alberta Court of Appeal) citing *Williams & Wilson v Toronto and Attorney-General of Ontario* [1946] OR 309, [1946] 4 DLR 27; *Gibbs v Village of Grand Bend* [1995] 129 DLR (4th) 449 (Ontario Court of Appeal); *North Cronulla Precinct Committee Inc v Sutherland Shire Council* [1999] NSWCA 438 (3 December 1999). See further below at section 7 of this Chapter.

<sup>158</sup> [1967] Ch 449 at p 474A.

<sup>159</sup> [1990] EWCA Civ 12, [1991] Ch 271.

<sup>160</sup> See n 157, above.

in *Blundell v Catterall*. Common law judgments have found a public right can arise where presumptions of dedication rest on use for only 3 years,<sup>161</sup> or 7 years,<sup>162</sup> 20 years,<sup>163</sup> or 40 years.<sup>164</sup> A public right to bathe at the seashore must now be recognised as part of the common law of England based on long uninterrupted use as of right by virtue of implied dedication of all seashores where the public habitually recreate.

In his eloquent dissenting opinion in *Blundell v Catterall*, Best J believed free access to the sea as a privilege too important to be left to the arbitrary indulgence of private littoral lords of manors.<sup>165</sup> Best J viewed the authorities of *Bracton* and *Hale* as establishing a general common law right of way over the sea and seashore which right of way subsumed the more specific rights of navigation, fishing, swimming or bathing, &c. His Honour showed how rights of fishing were regarded as part of the general right of way over the seashore.<sup>166</sup> Citing *Hale*, and applying the principles to the case of bathing on the seashore, Best J stated:

“The universal practice of England shows the right of way over the seashore to be a common law right. All sorts of persons who resort to the sea, either for business or pleasure, have always been accustomed to pass over the unoccupied parts of the shore with such carriages as were suitable to their respective purposes, and no lord of a manor has ever attempted to interrupt such persons... Persons have at all times, at their pleasure, walked or ridden on the sands. Men have, from the earliest times, bathed in the sea; and unless in places or at seasons when they could not, consistently with decency, be permitted to be naked, no one ever attempted to prevent them. So far from allowing lords of manors

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<sup>161</sup> *Rowley v Tottenham UDC* [1914] AC 95.

<sup>162</sup> *R v Petrie* (1855) 4 B & El 737, 119 ER 272.

<sup>163</sup> *Poole v Huskinson* (1843) 11 M & W 827, 152 ER 1039.

<sup>164</sup> *Turner v Walsh* (1881) 6 App Cas 636 (Privy Council).

<sup>165</sup> *Blundell v Catterall* (1821) 5 B & Ald 268 at pp 274-75, 100 ER 1190.

<sup>166</sup> Justice Best, commenting on the common law right to fish at the seashore (such right found by the majority to be established by the common law), viewed the common law right to fish not as an independent common law right (as the majority so did), but as “part of the more general right of the subjects to the sea and its shores, [as] proved by Lord Hale... in part 1, cap. 8 De Jure Maris, p.11.” (*Blundell v Catterall* (1821) 5 B & Ald 268 at pp 284-85, 100 ER 1190 (Best J)). “I shall presently show from authority, that the right to fish is only a part of the general right of the subjects of England. Persons have also crossed the beach for the purpose of fishing in the sea, and have brought back their fish over the beach, both on horses and in carriages. These acts of fishermen are instances in support of the common law right of way.” (*Blundell v Catterall* (1821) 5 B & Ald 268 at p 279, 100 ER 1190 (Best J)).

to restrain persons from bathing, it will give them every facility for this recreation. Bathing promotes health... It has been found as a fact, in this case, that it has been the custom for the public to cross the spot in question on foot for the purpose of bathing.”<sup>167</sup>

In his interpretation of the authorities, Best J was of the opinion that: “The instances put by me, sufficiently demonstrate the existence of a universal custom in favour of a public right of way over the seashore.”<sup>168</sup> His Honour concluded:

“The shore of the sea is admitted to have been at one time the property of the King. From the general nature of this property, it could never be used for exclusive occupation. It was holden by the King, like the sea and the highways, for all his subjects. The soil could only be transferred subject to this public trust; and general usage shows that the public right has been excepted out of the grant of the soil. Our law books furnish us with little for our guidance on this subject; what is to be found seems to favour the common law right of way. But unless I felt myself bound by an authority as strong and clear as an act of parliament, I would hold on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance... The principle of exclusive appropriation must not be carried beyond things capable or improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours...”<sup>169</sup>

Justice Best’s opinion that public rights such as a right to bathing in the sea must exist at places owned by the Crown finds support from the majority judgment in the case which is otherwise dismissive of a common law public right to bathe in the sea. Justice Bayley, giving judgment along with the majority, conceded that: “The King, for the public welfare, may

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<sup>167</sup> *Blundell v Catterall* (1821) 5 B & Ald 268 at pp 278-79, 100 ER 1190.

<sup>168</sup> *ibid* at pp 279-80.

<sup>169</sup> *ibid* at p 287.

suffer such a right to be exercised in those parts of the shore which remain in his hands to any extent which the convenience of the public may require.”<sup>170</sup>

## 5. Understanding the *Blundell v Catterall* blunder

The *Blundell v Catterall* case may be distinguishable on very narrow grounds – although the subsequent judgments of *Llandudno* and *Brinckman v Matley* have refused to see it in such light. Professor Tim Bonyhady in *The Law of the Countryside, The Rights of the Public* roundly criticises the judgment, stating that the decision is simply reflective of the very many judgments in the eighteenth and nineteenth centuries that reduced public rights previously enjoyed by the public in favour of private property rights.<sup>171</sup> Bonyhady’s viewpoint, along with that in other journal articles,<sup>172</sup> is that the *Blundell v Catterall* decision can only be understood as part of a 200 year property law controversy as to the ownership of the foreshore, and must be read in conjunction with the long series of cases which established proprietary ownership over the foreshore. Indeed, Bonyhady views the decision as at least partly a result of judicial bias in favour of the landed classes.<sup>173</sup>

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<sup>170</sup> *ibid* at p 306.

<sup>171</sup> T Bonyhady *The Law of the Countryside, The Rights of the Public* (Professional Books Abingdon 1987) at pp 6, 7-9. Legal history scholarship on littoral ownership of the foreshore reveals inconsistent theories whereby at one time, in both Saxon times and after the Norman conquest, and confirmed in decisions such as *Bell v Gough* 23 NJL 624 at p 661 (1852), the adjacent upland owner both by express charter and by clear implication owned the foreshore, whereas subsequent legal opinion in *Attorney-General v Philpot* (unreported, see SA Moore *A History of the Foreshore and the Law relating thereto* (Stevens and Haynes London 1888) at p 262; W Taylor ‘The Seashore and the People’ (1925) 10 Corn LQ 303 at pp 306-307) and Hale’s *De Jure Maris*, ch iv sub ii, claim the foreshore as a ‘de jure communi’ belonging prima facie to the King. The prima facie theory of Crown ownership of the foreshore was confirmed in *Lord Advocate v Blantyre* (1879) 4 AC 770 at p 773. See W Taylor ‘The Seashore and the People’ (1925) 10 Corn LQ 303 at pp 306-11 and 326-28, citing, principally Moore *A History of the Foreshore and the Law relating thereto* (Stevens and Haynes London 1888) and Riggs ‘Alienability of the Foreshore’ 12 Col LR 402; and GS Parsons ‘Public and Private Rights in the Foreshore’ (1922) 22 Colum LR 706 at pp 706-711. See also JD Curtis ‘Coastal Recreation – Legal Methods for Securing Public Rights in the Seashore’ (1981) 33 Me LR 69 at pp 73-77.

<sup>172</sup> *ibid*, citing H Hovenkamp ‘The Economics of Legal History’ (1983) 67 Minn LR 645 at pp 663-66; C Rose ‘The Comedy of the Commons: Custom, Commerce and Inherently Public Property’ (1986) 53 U Chicago LR at pp 711-12.

<sup>173</sup> T Bonyhady *The Law of the Countryside, The Rights of the Public* (Professional Books Abingdon 1987) at p 9 citing PS Atiyah *The Rise and Fall of the Freedom of Contract* (Clarendon Press Oxford 1979) at pp 97-98.



The majority judgments in *Blundell v Catterall* may be viewed as narrow only, in that they hold that a public right to bathe at the seashore, and to pass across the beach for the purposes of bathing, cannot exist at a place which is private property because the granting of private title extinguished the public right previously extant at that place. In support of their decision upholding the private littoral owner's rights of possession, the majority in *Blundell v Catterall* relied on *Hale* as authority on the nature and extent of the private littoral owner's rights. Whilst the court recognized the public right to fish at the seashore, the court also found that the granting of private property extinguishes the public right to fish at the seashore adjoining private property.<sup>174</sup> Justice Bayley opined: "If the soil is vested in an individual, is he to be deprived of the right of saying how that soil shall be used...?"; "[I]f an individual had the grant of the seashore from the Crown, and were using it for recreation or bathing, he or his family might be interrupted and deprived of all privacy by the exercise of this common law right [to bathe]."<sup>175</sup> Yet subsequent decisions must now be read to disapprove of *Blundell v Catterall*. In *Lord Fitzhardinge v Purcell*, although Parker J held that the Crown might grant title to the bed of the sea or of a tidal navigable river to a subject, his Lordship held that no such grant can operate to the detriment of the public right of fishing.<sup>176</sup> In *Arnhemland Aboriginal Land Trust v Director of Fisheries (Northern Territory)*,<sup>177</sup> and in *Commonwealth of Australia v Yarmirr*, the court followed *Harper v Minister for Sea Fisheries*,<sup>178</sup> and *Attorney General for British Columbia v Attorney General for Canada*, where the Privy Council said: "In the tidal waters, whether on the foreshore or in creeks, estuaries, and tidal rivers, the public have the right to fish, and by reason of the provisions of Magna Charta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant or otherwise."<sup>179</sup> The judgment of the Privy Council in *Attorney-General for British Columbia*,<sup>180</sup> and the judgment of

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<sup>174</sup> *Blundell v Catterall* (1821) 5 B & Ald 268, 100 ER 1190, at p 295 of the former report (Holroyd J citing *Hale*); at p 307 of the former report (Bayley J).

<sup>175</sup> *ibid* at p 306.

<sup>176</sup> [1908] 2 Ch 139 at 166-7, followed in *Harper v Minister for Sea Fisheries* [1989] HCA 47, (1989) 168 CLR 314 at pp 329-30 (Brennan J).

<sup>177</sup> [2000] FCA 165 (the question for consideration was whether the *Fisheries Act 1988* (NT) excluded or extinguished the public right to fish).

<sup>178</sup> [1989] HCA 47, (1989) 168 CLR 314 at pp 329-30 (Brennan J), following *Attorney General for British Columbia v Attorney General for Canada* [1914] AC 153 at 170-71 (Viscount Haldane).

<sup>179</sup> [1914] AC 153 at p 171 (Viscount Haldane) (adopted by Brennan J in the course of his Honour's reasons in *Harper v Minister for Sea Fisheries* [1989] HCA 47; (1989) 168 CLR 314 at pp 329-30 (Brennan J) )

<sup>180</sup> [1914] AC 153 at 170-71 (Viscount Haldane).

the Federal Court of Australia in *Commonwealth of Australia v Yarmirr*,<sup>181</sup> must be understood to overrule *Blundell v Catterall* on this point. Only legislation by parliament will abrogate public rights at the foreshore: *Attorney-General for British Columbia*,<sup>182</sup> *Harper v Minister for Sea Fisheries*,<sup>183</sup> *Commonwealth of Australia v Yarmirr*,<sup>184</sup> *Arnhemland Aboriginal Land Trust v Director of Fisheries (Northern Territory)*.<sup>185</sup>

In securing private property rights, the court in *Blundell v Catterall* distinguished legal authority as unrepresentative of the common law,<sup>186</sup> and, when faced with an absence of authority on point, interpreted this absence as meaning that the alleged public rights did not exist rather than that the activities in question had never previously been challenged because they had always been regarded as lawful.<sup>187</sup> In dismissing the authority of *Bracton*, the Judges in *Blundell v Catterall* may be regarded as committing the ultimate transgression of the judicial activist in that they fail to apply precedent in favour of policy. The majority ignore that advice of Lord Tenterden CJ who said in 1832: “the decisions of our predecessors, the judges of former times, ought to be followed and adopted, unless we can see **very clearly** that they are erroneous, for otherwise there will be no certainty in the **administration** of the law.”<sup>188</sup> The Judges pay no heed to the advice of Blackstone who writes that precedents must be followed unless “flatly absurd and unjust; and that is so even if they appear unjust to

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<sup>181</sup> [1999] FCA 1668 at paras [539]-[541].

<sup>182</sup> [1914] AC 153 at 170-71 (Viscount Haldane). Viscount Haldane LC, speaking for the Privy Council said at p 170: “Since the decision of the House of Lords in *Malcomson v O’Dea* (1863) 10 HLC 593, 11 ER 1155, it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia.”

<sup>183</sup> [1989] HCA 47, (1989) 168 CLR 314 at pp 330.

<sup>184</sup> [1999] FCA 1668 at paras [543] and [549].

<sup>185</sup> [2000] FCA 165 at para [52].

<sup>186</sup> The majority in *Blundell v Catterall* viewed *Bracton* as unrepresentative of the common law. The majority opined that *Bracton* is not authority of the common law, but of the civil law only: “[I]ts principles have not only not been adopted into the common law, but are at variance with it, and therefore no guide to us; that the public right to the extent claimed in this case is not only not found to be established by our law, but that the established principles of our law are inconsistent with it.” *Blundell v Catterall* (1821) 5 B & Ald 268, 100 ER 1190, at pp 290-91 of the former report (Holroyd J). See also at pp 308-10 (Bayley J); and at p 312 (Abbott CJ).

<sup>187</sup> See T Bonyhady *The Law of the Countryside, The Rights of the Public* (Professional Books Abingdon 1987) at p 7, citing *Blundell v Catterall* (1821) 5 B & Ald 268, 106 ER 1190; RG Hall *The Rights of the Crown and the privileges of the subject in the seashores of the realm* (2<sup>nd</sup> edn Stevens and Haynes London 1875) at pp 158-59; and H Gallienne Lemmon *Public Rights in the Seashore* (Pitman London 1934) at p 175.

<sup>188</sup> *Selby v Bardons* (1832) 3 B & Ad at p 17.

us, if they lay down settled law and are not repugnant to natural justice.”<sup>189</sup> *Bracton* was regarded as good authority. Best J, in his dissenting judgment in *Blundell v Catterall*, cited *Bracton* bk1 ch 2 s 6 as foundation for the existence of a public right to bathe at the seashore concomitant with the other public rights of way on the sea and seashore, the right to navigation and the right to fish, and noted that:

“But our books show that this passage has been adopted into our law. Mr Justice Buller tells us that *Callis* quotes it as English law, and I have often heard Lord Kenyon speak with great respect of that writer. *Bracton* has not stated this as civil law, he has made it part of his book... He was Chief Justice of England in the reign of Henry the Third; and Lord Hale (*History of the Common Law*, ch. 7) says that in his time the common law was much improved and the pleadings were more perfect and orderly than in any preceding period of our history. Surely such a man is no mean authority for what the common law was at the time he wrote. In *Fortescue*, p. 408, Lord Chief Justice Parker says, ‘As to the authority of *Bracton*, to be sure many things are now altered, but there is no colour to say that it was not law at that time, for there are many things that never have been altered, and are law now.’ ...I do not say that the whole of the passage in *Bracton* is now good law; it was all good law at the time he wrote, and all of it that is adapted to the present state of things is good law now.”

Respecting the majority’s dismissal of *Bracton* as not representative of English law, and as being of relevance only to the civil law, as opined by Holroyd J at page 292 of the report, the majority fail to account for the how the development of the common law occurred consequent to an admixture of ancient customs and laws, and make no mention of Blackstone on this point who writes, with authority:

“[T]he truth seems to be, that there never was any formal exchange of one system of laws for another: though doubtless by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and

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<sup>189</sup> *Commentaries* i 70: Sir W Blackstone *Commentaries on the Laws of England* (Clarendon Press Oxford 1765-1769) vol i, at p 70.

the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established: thereby in all probability improving the texture and wisdom of the whole, by the accumulated wisdom of divers particular countries. Our laws, faith lord Bacon, are mixed as our language: and as our language is so much the richer, the laws are the more complete. And indeed our antiquarians and first historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us, that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his dome-book or liber judicialis, for the general use of the whole kingdom.”<sup>190</sup>

Further, the majority fail to adopt logic in their reasoning because they fail to consider how a public right to bathe in the seashore might arise by implied dedication of land from long uninterrupted use of a place for bathing.<sup>191</sup> Evidence adduced in the case was that guest from the hotel adjacent to the plaintiff’s manor had used the seashore in question for some 6 years for bathing, and further evidence was that other persons had used the seashore for bathing for many years.<sup>192</sup>

The English decisions may thus represent a lack of judicial sympathy for public rights. The methodology used in the dissenting judgment of Justice Best to found a public right to bathe at the seashore as but one part of a general common law public right to use of the sea and seashore for all lawful purposes, along with rights of navigation and of fishing, is preferred.

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<sup>190</sup> Sir W Blackstone *Commentaries on the Laws of England* (Clarendon Press Oxford 1765-1769) vol i, s 3, at p 64.

<sup>191</sup> *R v Lloyd* (1808) 1 Camp 261, 170 ER 950. The case of *R v Lloyd* was decided in 1808, prior to the 1821 *Blundell v Catterall* decision and thus the majority in *Blundell v Catterall* must be taken to have known that a right of way may be established by prescription; that is, the owner shall be presumed to have dedicated his land to the public. In *R v Lloyd* Lord Ellenborough stated: “If the owner of the soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public.” ((1808) 1 Camp 261 at p 262, 170 ER 950 at p 951. Cases decided after *Blundell v Catterall* include: *Poole v Huskinson* (1843) 11 M & W 827, 152 ER 1039; *R v Inhabitants of East Mark* (1848) 11 QB 877 at p 882 (Lord Denman CJ), 116 ER 701; *Cubitt v Maxse* (1873) LR 8 CP 704 at p 715 (Brett J); and *Turner v Walsh* (1880) 1 LR (NSW) 83, affirmed by the Privy Council ((1881) 6 App Cas 636); *Mann v Brodie* [1885] 10 App Cas 378. See further below at section 7 of this Chapter.

<sup>192</sup> *Blundell v Catterall* (1821) 5 B & Ald 268, 100 ER 1190, at p 279 of the former report (Best J), and at p289 of the former report (Holroyd J).

That such a public right to bathe, along with a public right to fish might be excluded or extinguished where the littoral owner is a private person, as opposed to the Crown, is the appropriate ratio decidendi of the case. For otherwise the very narrow distinctions made by the majority in their opinions appear nonsensical and have bizarre practical application. As Hall noted of the apparent inconsistency of the English courts in allowing a right of passage over the foreshore for fishermen, but not allowing it to mere strollers: “[I]t might have been expected that the courts would have allowed the shore to be used as a highway as much for one purpose as the other... instead of thus virtually declaring the same man to be trespasser for bathing who was no trespasser when up to his knees or neck in water, in search of a lobster, a crab, or a shrimp.”<sup>193</sup> The bizarre practical application of the *Blundell v Catterall* decision would see “the right to picnic in a rowboat while resting on the foreshore” as legal, but “brand as a trespass the same activities performed while sitting on a blanket spread on the foreshore.”<sup>194</sup>

In the United States, the courts, “quick to sense the undemocratic character of the English rule”<sup>195</sup> have consistently held that there is a public right of passage over the foreshore, as well as a right to bathe in the sea.<sup>196</sup> This democratic jurisprudence, safeguarding public rights of recreation, is seen in the fact that the ‘great ponds’ of New England have been declared as free for public use since the year 1641.<sup>197</sup> American courts have generally accepted the doctrine that ownership of the foreshore is in the State in trust for the

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<sup>193</sup> RG Hall *The Rights of the Crown and the privileges of the subject in the seashores of the realm* (2<sup>nd</sup> edn Stevens and Haynes London 1875) at p 184.

<sup>194</sup> JD Curtis ‘Coastal Recreation – Legal Methods for Securing Public Rights in the Seashore’ (1981) 33 Me LR 69 at p 83.

<sup>195</sup> ‘Water and Watercourses – Right of Public Passage along Great Lakes Beaches’ (1933) 31 Mich LR 1134 at pp 1138-39.

<sup>196</sup> See T Bonyhady *The Law of the Countryside, The Rights of the Public* (Professional Books Abingdon 1987) at p 12, noting JN Pomeroy *A Treatise on the Law of Water Rights* (West St Paul Minn 1893) s 222.

<sup>197</sup> Massachusetts Colonial Ordinance 1641; *Inhabitants of West Roxbury v Stoddard* 89 Mass (7 Allen) at p 166: the Court held that the colonists “intended to devote the great ponds to public use.” Under the Ordinance any pond with a surface area in excess of 10 acres was a ‘great pond’ and was declared as free for public use. This statute has been absorbed into the common law of Maine (*Thornton v Foss* 26 Me 402 (1847), *Barrows v McDermott* 73 Me 441 (1882)), Massachusetts (*Storer v Freeman* 6 Mass (Tyng) 435 (1810)), and New Hampshire (*Clement v Burns* 43 NH 609 (1862)). See JM Gould *A Treatise on the Law of Waters* (2<sup>nd</sup> edn Callaghan Chicago 1891) at p 165, noted in ‘Water and Watercourses – Right of Public Passage along Great Lakes Beaches’ (1933) 31 Mich LR 1134 at fn 26, at p 1140; and in JD Curtis ‘Coastal Recreation – Legal Methods for Securing Public Rights in the Seashore’ (1981) 33 Me LR 69 at pp 71-73, 78-83.

beneficial use of the public.<sup>198</sup> The public trust doctrine is one methodology that courts in the coastal States of the United States use to protect the public rights over the foreshore. Courts have upheld a public right of passage over the foreshore as incident to the right of navigation and have held that public rights at the foreshore extend to recreative pursuits. In *Borough of Neptune City v Borough of Avon-by-the-Sea*, the New Jersey Court stated: “We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.”<sup>199</sup> There exists a right of passage along the shores of the Great Lakes.<sup>200</sup> And some jurisdictions have extended public rights over the foreshore to the dry land adjoining the foreshore, including beaches and parks: note *Borough of Neptune City* where the court extended the public’s right to sunbathe and enjoy other recreational activities to privately owned dry sand beach;<sup>201</sup> and *Matthews v Bay Head Improvement Association*, where the court held that reasonable enjoyment of the foreshore and the sea could not be realized unless some enjoyment of the dry sand area is also allowed.<sup>202</sup>

Even where the foreshore is deemed owned by a private individual, the courts in most American jurisdictions adopt the doctrine that the littoral owner takes title subject to a public right of passage.<sup>203</sup> Although Massachusetts has refused to recognize a general public recreational right at the foreshore, the Massachusetts Supreme Judicial Court has held that the right of navigation includes activities such as boating, swimming or floating upon the

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<sup>198</sup> See *Raleigh Avenue Beach Association v Atlantis Beach Club Inc* 879 A2d 112 (2005); and *Matthews v Bay Head Improvement Association* 471 A2d 355 at p 358 (1984). See JD Curtis ‘Coastal Recreation – Legal Methods for Securing Public Rights in the Seashore’ (1981) 33 Me LR 69 at fn 1, citing *Martin v Waddall* 41 US (16 Pet) 367, 410, 416 (1842); *Koyer v Miner* 172 Cal 448, 156 Pac 1023 (1916); *Rochester v Barney* 117 Conn 462, 169 Atl 45 (1933); *Brickell v Trammell* 77 Fla 544, 82 So 221 (1919); *Arnold v Mundy* 6 NJL 1 (1821); *People v Brennan* 142 Misc 225, 255 NYS 331 (1931); *Galveston v Mann* 135 Tex 319, 143 SW 2d 1028 (1940); and ‘Water and Watercourses – Right of Public Passage along Great Lakes Beaches’ (1933) 31 Mich LR 1134 at pp 1137, citing *Long Beach Land & Water Co v Richardson* 70 Cal 206, 11 Pac 695 (1886); *Hess v Muir* 65 Md 586, 5 Atl 540, 6 Atl 673 (1886); *Parker v West Coast Packing Co* 17 Or 510, 21 Pac 822 (1889); *Simons v French* 25 Conn 346 (1856); *New Jersey Zinc & Iron Co v Morris Canal & Banking Co* 44 NJ Eq 398, 15 Atl 227 (1888); *Roberts v Baumgarten* 110 NY 380, 18 NE 96 (1888); amongst others. And see JA Sullivan ‘Comment – Laying Out an Unwelcome Mat to Public Beach Access’ (2003) 18 J Land Use & Env L 331 at p 335.

<sup>199</sup> 294 A2d 47 at pp 54-55 (1972).

<sup>200</sup> ‘Water and Watercourses – Right of Public Passage along Great Lakes Beaches’ (1933) 31 Mich LR 1134 at fn 26, at pp 1142-1146, citing *Illinois Central R R v Illinois* 146 US 387, 13 Sup Ct 110 (1892).

<sup>201</sup> 294 A2d 47 (1972).

<sup>202</sup> 471 A2d 355 at p 365 (1984).

<sup>203</sup> See eg *Brickell v Trammell* 77 Fla 544, 82 So 221 (1919).

public waters covering the foreshore.<sup>204</sup> And in *Dewing v Old Black Point Association*,<sup>205</sup> the Superior Court of Connecticut opined that swimming in public waters was a public right. In that case, the plaintiff was injured when she dove off the defendant's raft into shallow waters. The court dismissed her claim, based on common law public nuisance, being of the opinion that only an interference with the public right to swim in the waters of Long Island Sound would create a cause of action. Recreational uses such as boating, bathing and skating upon the frozen surfaces of great ponds have also been recognized as public rights in New England: *Fay v Salem & Danvers Aqueduct Co*,<sup>206</sup> *Opinion of the Justices*.<sup>207</sup>

American jurisprudence strongly supports a public right of recreation at public places.

## 6. Public rights at public places dedicated to the public for public use

A public right to bathe or swim at the foreshore or a public right to recreation at the foreshore has not been litigated in Australia, although the common law of Australia does recognise a public right of navigation and a public right to fish: *Commonwealth of Australia v Yarmirr*,<sup>208</sup> *Harper v Minister for Sea Fisheries*,<sup>209</sup> *Arnhemland Aboriginal Land Trust v Director of*

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<sup>204</sup> *Opinion of the Justices* 365 Mass 681 at p 686, 313 NE 2d 561 at p 566 (1974).

<sup>205</sup> 19 Conn Supp 230, 111 A 2d 29 (1954) at p 231 of the former report.

<sup>206</sup> 111 Mass 27 (1872).

<sup>207</sup> 118 Me 503, 106 Atl 865 (1919).

<sup>208</sup> [1999] FCA 1668 at paras [527]-[571]; *The Commonwealth v Yarmirr* [2001] HCA 56 at paras [96]-[98], (2001) 75 ALJR 1582 at p 1604; *Western Australia v Ward* [2002] HCA 28 at para [388], (2002) 213 CLR 1.

<sup>209</sup> [1989] HCA 47, (1989) 168 CLR 314 at pp 329-330 (Brennan J). His Honour said: "[These] were tidal waters. Accordingly, the right of the owner of the soil over which the waters flow (whether the owner be the Crown or not) to enjoy the exclusive right of fishing in those waters or to grant such a right to another as a profit à prendre is qualified by the paramount right to fish vested in the public... In *Malcomson v O'Dea*, it was held that, after Magna Charta, the Crown, in whom the title to the bed of tidal navigable rivers was vested, was precluded from granting a private right of fishery, the right of fishery being in the public. The law so stated was followed in *Neill v Duke of Devonshire*. And in *Lord Fitzhardinge v Purcell*, although Parker J held that the Crown might grant title to the bed of the sea or of a tidal navigable river to a subject, his Lordship held that no such grant can operate to the detriment of the public right of fishing. The existence of a public right to fish in tidal waters was accepted by Stephen and Jacobs JJ in [*New South Wales v The Commonwealth* [1975] HCA 58, (1975) 135 CLR 337]." And at para [98] the High Court Australia reiterated: "there is a fundamental inconsistency between the asserted native title rights and interests and the common law public rights of navigation and fishing, as well as the right of innocent passage. The two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international rights."

*Fisheries (Northern Territory)*.<sup>210</sup> Similarly in Canada: *Attorney General for British Columbia v Attorney General for Canada*.<sup>211</sup> In *The Commonwealth v Yarmirr*,<sup>212</sup> and *Western Australia v Ward*,<sup>213</sup> the High Court of Australia has stated categorically that there is a fundamental inconsistency between a native title right and interest said to amount to a right to occupy, use and enjoy waters to the exclusion of all others or a right to possess those waters to the exclusion of all others and common law public rights of navigation over and of fishing in those waters. A publicly exhibited sporting event which seeks to exclude the public from a part of the sea or the foreshore is in the same position as the claimants of native title. The High Court of Australia will not recognize any claim of exclusive use of the territorial seas or the foreshore. Further, the common law will extend beyond the territorial limits at the low-water mark of the foreshore to protect public rights existing on the seas and the foreshore.<sup>214</sup>

The consequence of *Blundell v Catterall* may be avoided where cities and towns take leases of

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<sup>210</sup> [2000] FCA 165 at paras [48]-[49] and [92], applying *Harper v Minister for Sea Fisheries* [1989] HCA 47, (1989) 168 CLR 314 at pp 329-330; *Blundell v Catterall* (1821) 5 B & Ald 268; and *Brinckman v Matley* [1904] 2 Ch 313 at p 316. At para [92] Mansfield J stated: "In my view, the public right to fish must carry with it a right of passage upon the waters in the intertidal zone for the purposes of fishing; *Halsbury's Laws of England*, 4<sup>th</sup> ed, Vol 18, par 614; *Blundell v Catterall* (1821) 5 B & Ald 268; *Brinckman v Matley* [1904] 2 Ch 313 at 316."

<sup>211</sup> [1914] AC 153 at pp 167 and 171. The Privy Council said at p 171 (in a passage adopted by Brennan J in *Harper v Minister for Sea Fisheries* [1989] HCA 47, (1989) 168 CLR 314 at pp 329-330): "In the tidal waters, whether on the foreshore or in creeks, estuaries, and tidal rivers, the public have the right to fish, and by reason of the provisions of Magna Charta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant or otherwise."

<sup>212</sup> [2001] HCA 56 at paras [96]-[98], (2001) 75 ALJR 1582 at p 1604.

<sup>213</sup> [2002] HCA 28 at para [388], (2002) 213 CLR 1.

<sup>214</sup> Whilst the High Court of Australia in *Commonwealth of Australia v Yarmirr* [2001] HCA 56 acknowledged there was uncertainty as to the jurisdiction of the common law in respect of the territorial sea, the court rejected any notion that common law public rights were not justiciable. The court stated at para [34]: "If the contention that the common law does not 'extend', 'apply', or 'operate' beyond low-water mark is intended to mean, or imply, that, absent statute, no rights deriving from or relating to events occurring or places lying beyond low-water mark can be enforced in Australian courts, it is altogether too large a proposition and it is wrong. The territorial sea is not and never has been a lawless province [*Post Office v Estuary Radio Ltd* [1968] 2 QB 740 at p 754 (Diplock LJ)]. The courts of England and Wales and the courts of Australia have long since given effect to rights and duties which derive from transactions and events which have occurred in that area. The very existence of the body of Admiralty law denies the generality of a proposition understood in the way we have identified. It suggests at least that the reference to "common law", in the proposition about its reach, is to be understood as restricted to that part of the unwritten law which was administered in the common law courts. Reference to the history of the jurisdictional conflicts between the courts of Admiralty and the common law courts [Mears 'The History of the Admiralty Jurisdiction' in *Select Essays in Anglo-American Legal History* (1908) vol 2, at pp 312-364; Prichard and Yale *Hale and Fleetwood on Admiralty Jurisdiction* (Selden Society 1992) vol 108, at xlvii-lviii] reinforces that view, especially when it is recalled that from 1536 [28 Hen 8 c 15] the criminal jurisdiction of the Admiralty in relation to crimes at sea was exercised by the judges of the common law courts as commissioners of oyer and terminer [Holdsworth *A History of English Law* (7<sup>th</sup> edn 1956) vol 1, at pp 550-552].



the foreshore and formally dedicate it to the public,<sup>215</sup> or where the Crown or the State formally dedicates land to the public for public use. Private property owners may also dedicate land to the public for a public purpose by deed.<sup>216</sup> Statutes in all common law jurisdictions provide that the Crown or State may dedicate public land to the public for public use. For example, section 4 of the Crown Land (Reserves) Act 1978 (Vic) provides power to reserve Crown land for public purposes in Victoria; section 80 Crown Lands Acts (NSW) provide power to dedicate Crown land for public purpose in New South Wales; and note also section 15(2) of the Lands Act 1996 of British Columbia, Canada, RSBC 1996 c. 245 which provides the Lieutenant Governor in Council power to reserve Crown Land for any purpose that is in the public interest.

Where the Crown grants land for public use, the public will subsequently have a right to use of that land, though the use may be qualified by the purposes for which the land is granted. Dedication of land to a public use may be by virtue of a formal act of some kind, as the discussion by Windeyer J in *Randwick Municipal Council v Rutledge* shows.<sup>217</sup> With respect to New South Wales, his Honour suggested that ‘dedicate’ indicated (in the context of Crown land), “something binding the Crown and creating some right in members of the public or of a section of the public.”<sup>218</sup> There was in *Rutledge* a dedication of land by Crown grant to trustees, although not to a public use. *Rutledge* concerned the Randwick racecourse in Sydney and the question raised on appeal was whether such land was a public reserve available for use by the public as of right. Whilst Menzies and Windeyer JJ held that the land in question was a place of public recreation, they decided that the land was not a public reserve available for use by the public as of right.<sup>219</sup> The public had no public right to use the racecourse and

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<sup>215</sup> 139 LT 381 (1915), cited in ‘Water and Watercourses – Right of Public Passage along Great Lakes Beaches’ (1933) 31 Mich LR 1134 at fn 26, at p 1137.

<sup>216</sup> Note eg s 16 of the Countryside and Rights of Way Act 2000 (UK) provides a legislative regime by which private land might be dedicated to the public for public purposes in the United Kingdom.

<sup>217</sup> [1959] HCA 63, (1959) 102 CLR 54 at pp 73-77, cited with approval in *North Cronulla Precinct Committee Inc v Sutherland Shire Council* [1999] NSWCA 438 at para [99].

<sup>218</sup> *ibid* at p 74.

<sup>219</sup> *ibid* at pp 67, 68 (Menzies J) and at pp 70, 88 (Windeyer J). In *Rutledge*, the question to be determined was whether Randwick racecourse was rateable land, or came within an exception in s132(1)(a) of the Local Government Act 1919 covering “Land which is vested in the Crown or in a public body or in trustees and is used for a public reserve.” The definition of ‘public reserve’ therefore fell for consideration. Windeyer J stated, at page 88, the principles that determine whether land is to be used for public recreation and enjoyment. They were that (i) the land must be, in the relevant sense, open to the public generally as of right; and (ii) it must not be a source of private profit. In the result, in *Rutledge*, it was held that Randwick racecourse was not a

it followed that the racecourse could not be properly described at law as a public reserve: “The term ‘public reserve’ – and the word ‘reserve’ alone, when not controlled by a definition or a context indicative of a different sense – have come to be used in common parlance in Australia in an imprecise way to describe an unoccupied area of land preserved as an open space or park for public enjoyment, to which the public ordinarily have access as of right.”<sup>220</sup> A case to which Windeyer J referred in his judgment, *Municipal Council of Sydney v Attorney General for New South Wales*,<sup>221</sup> illustrates dedication by a formal act to a public use. The Privy Council in *Municipal Council of Sydney* held that the dedication of Moore Park as ‘permanent common’ by notice of dedication by the Governor published in the Government Gazette meant that the area was to “go forever for the common or public enjoyment”, in which may be seen that the area was to be open to the public generally as of right. Dedication of land to the public for a particular purpose, such as a racecourse,<sup>222</sup> might not create a public right of use; though land which is dedicated to the public as a reserve may be used for a zoo or for other purposes concomitant with a public right of use.<sup>223</sup> As Menzies J stated in *Rutledge*: “...[U]ses which by themselves would not seem to be obvious uses for a public reserve might, as part of a wider use, be properly regarded as part of a use for a public reserve, eg the establishment and management of a restaurant by private caterers or the hiring of pleasure boats in a public park, the provision of stalls for the sale of machinery at an agricultural show, the granting of privileges to members of a society in the use of zoological gardens. Indeed, I have no reason to think that the actual decision in *Spain’s Case* that Taronga Park was used for a public park, was not correct.”<sup>224</sup> The decision in *Spain’s Case*,<sup>225</sup> was that Taronga Zoological Gardens were in fact used for a public reserve, and the circumstances which might be regarded as limiting the public’s right of use, such as the requirement for payment of a fee to enter the zoo, were not matters which the court viewed as incompatible with the land being a public reserve nor incompatible with the existence of a public right of use. The existence of facilities or trades within the area of a public park or

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‘public reserve’ (at p 95). Neither was the land dedicated or used as a public reserve within the definition of such in s4 of the Local Government Act 1919. The trust in *Rutledge* allowed uses of the land (for example as a training establishment) which were clearly not public purposes.

<sup>220</sup> [1959] HCA 63, (1959) 102 CLR 54 at p 70.

<sup>221</sup> (1894) AC 444 (Privy Council).

<sup>222</sup> *Randwick Municipal Council v Rutledge* [1959] HCA 63, (1959) 102 CLR 54.

<sup>223</sup> *Mosman Municipal Council v Spain* (1929) 29 SR (NSW) 492, 46 WN 174.

<sup>224</sup> [1959] HCA 63, (1959) 102 CLR 54 at p 65, citing *Mosman Municipal Council v Spain* (1929) 29 SR (NSW) 492, 46 WN 174.

<sup>225</sup> (1929) 29 SR (NSW) 492, 46 WN 174

public reserve dedicated to the public will not cancel the existence of a public right of use, though such public right of use may be qualified.

As with public highways, land dedicated for public benefit creates, at common law, a public right to use of such places. In reference to public roads, Lord Scott of Foscote recently noted, in *Man O'War Station Ltd v Auckland City Council*, that: "At common law, the dedication of land as a public highway creates a public right of passage."<sup>226</sup> So too with other public places, such as beaches, parks, or commons. Of the beach in *Enright v Coolum Resort Pty Ltd*,<sup>227</sup> a civil suit in negligence upon the death of a swimmer in the surf at a beach on the Sunshine Coast in Queensland, Justice Moynihan noted that it was Crown Land dedicated to the public for public use. His Honour said: "Yaroomba Beach is crown land. By an order in council of 26 November 1997 the Governor in Council declared parts of the seashore and land under the sea at Yaroomba Beach a bathing reserve under the management and control of the defendant Council for the public benefit."<sup>228</sup> Beaches dedicated to the public for public use create a public right to use of the beach for recreation, physical activity, or right of way. Tobias JA observed in *Wyong Shire Council v Vairy*, a decision of the New South Wales Court of Appeal, in a case concerning personal injuries suffered by the plaintiff after diving off a rock platform into the sea at a popular Central Coast, New South Wales, beach, that: "In coastal New South Wales and, no doubt, in other coastal areas of Australia, public authorities such as local government councils have the care, control and management of ocean beaches, tidal creeks and estuaries. Members of the public enter these areas as of right for various recreational purposes including swimming and surfing. In many cases the public authority encourages, actively or passively, and/or promotes the use of its beaches and creeks for those purposes."<sup>229</sup> Amongst the public rights that are created consequent to a formal dedication of land to the public for public use are public rights of way, a public right of recreation, a public right of surfing on the sea, and a public right of swimming at the foreshore.

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<sup>226</sup> [2002] UKPC 32 (17 June 2002) at para [31].

<sup>227</sup> [2002] QSC 394 (29 November 2002).

<sup>228</sup> *ibid* at para [5].

<sup>229</sup> [2004] NSWCA 247 (27 July 2004) at para [15].

## 7. Public rights arising by long uninterrupted use

Where there is no formal dedication of land to the public for the public's use, public rights in respect of land may yet arise where the public make uninhibited use of the land in question. Lord Blackburn stated in *Mann v Brodie*: “[W]here there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was. It is therefore, I may say, in England never practically necessary to rely on prescription to establish a public way.”<sup>230</sup> The criteria upon which a court will rely in making a presumption as to the existence of a public right in respect of use of land are: (1) Intention to dedicate, which is inferred where there is apparent acquiescence; (2) Acceptance by the public, which is inferred from the circumstances of use; (3) Use for a substantial period of time; (4) Use as of right; that is the public must believe themselves to be exercising a public right and their use must not be secret, by force or under license; and (5) Use without interruption; for by interrupting public use with the intention of stopping public enjoyment of a place, a relevant landowner can prevent the creation of public rights.

The existence of a public right of recreation does not depend on a formal dedication. More usually public rights arise consequent to an ‘implied dedication’ which is nothing more than a decision of the courts that the use of a public place by the public is treated as evidence of dedication of the land to the public for public use and as evidence of the existence of a public right to use of the place so dedicated. Public rights in respect of land can arise irrespective of whether the land is owned by an individual in fee simple, or whether the land is Crown land. In *R v Lloyd*, Lord Ellenborough stated: “If the owner of the soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public.”<sup>231</sup> *R v Inhabitants of East Mark* holds that:

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<sup>230</sup> [1885] 10 App Cas 378 at p 386 (Lord Blackburn).

<sup>231</sup> (1808) 1 Camp 261 at p 262, 170 ER 950 at p 951.

“dedication might be presumed against the Crown from long acquiescence in public user.”<sup>232</sup>

And in *Turner v Walsh* the Privy Council affirmed that long continued user of a way by the public over land whether of the Crown or of a private owner gives rise to a presumption of dedication in the absence of anything to rebut it.<sup>233</sup> Uninhibited use of land by the public, for their own purposes, whether those purposes be for recreation, sports, travel, passage, or otherwise, creates (1) an inference of dedication of the land to the public for use by the public; (2) an inference of acceptance of the land by the public for use of which it is made; and (3) the creation of a public right.

Both the intention to dedicate the land to the public for public use, and the acceptance of the dedication, may be inferred from the circumstances of a long uninterrupted use of the land by the public.<sup>234</sup> In the Canadian case of *Gibbs v Village of Grand Bend*,<sup>235</sup> Justice Brooke reiterated: “Open and unobstructed use by the public for a substantial period of time is, as a rule, the evidence from which a trier of fact may infer both dedication and acceptance. This principle seems to have been generally accepted...”<sup>236</sup> Where a landowner apparently acquiesces in the public use, the courts simply may presume dedication: *Mann v Brodie*,<sup>237</sup> followed in *Folkestone Corporation v Brockman*,<sup>238</sup> *Williams-Ellis v Cobb*,<sup>239</sup> and in *R v Oxfordshire County Council ex parte Sunningwell Parish Council*.<sup>240</sup> In *Sunningwell*, Lord Hoffmann followed in *Dalton v Angus*, where Fry J (advising the House of Lords) rationalized the law of prescription as follows:

“[T]he whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence.

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<sup>232</sup> (1848) 11 QB 877; 116 ER 701.

<sup>233</sup> (1880) 1 LR (NSW) 83, affirmed by the Privy Council: (1881) 6 App Cas 636.

<sup>234</sup> *R v Lloyd* (1808) 1 Camp 261, 170 ER 950; *Poole v Huskinson* (1843) 11 M & W 827, 152 ER 1039; *R v Inhabitants of East Mark* (1848) 11 QB 877 at p 882 (Lord Denman CJ); *Turner v Walsh* (1881) 6 App Cas 636, at p 642; *Mann v Brodie* [1885] 10 App Cas 378; *O’Neil v Harper* (1913) 10 DLR 433, 28 OLR 635 (CA); *Hunsinger v Town of Simcoe* [1946] 2 DLR 632, [1946] OR 203, [1946] OWN 189 (CA), affirmed [1948] 3 DLR 224 (SCC); *Foothills No 31 (Municipal District) v Stockwell* (1985) 39 RPR 82 at p 84; [1986] 1 WWR 668; 41 Alta LR (2d) 184 (Alberta Court of Appeal) citing *Williams & Wilson v Toronto and Attorney-General of Ontario* [1946] OR 309, [1946] 4 DLR 27; *Gibbs v Village of Grand Bend* [1995] 129 DLR (4th) 449 (Ontario Court of Appeal); *North Cronulla Precinct Committee Inc v Sutherland Shire Council* [1999] NSWCA 438 at para [99]

<sup>235</sup> [1995] 129 DLR (4th) 449 (Ontario Court of Appeal).

<sup>236</sup> *ibid* at p 484.

<sup>237</sup> (1885) 10 App Cas 378 (House of Lords) at p 386 (Lord Blackburn).

<sup>238</sup> [1914] AC 338 at p 352 (Lord Kinnear), at pp 362-63 (Lord Atkinson).

<sup>239</sup> [1935] 1 KB 310 at p 331 (Talbot J).

<sup>240</sup> [1999] UKHL 28, [1999] 3 WLR 160 at p 168 (Lord Hoffmann). Lord Hoffmann said: “The presumption arises, as Fry J said of prescription generally in *Dalton v Angus* (1881) 6 App Cas 740, 773, from acquiescence.”

The courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest.”<sup>241</sup>

There are many cases where judges have shown willingness to imply dedication of a right from long uninterrupted use. In *Attorney-General and Newton and Abbot RDC v Dyer*, adopting the view of Justice Cardozo that “property like other social institutions has a social function to fulfil” (BN Cardozo *The Nature of the Judicial Process* (Yale University Press New Haven 1922) at p 87), Evershed J stated that where public use of a footpath has its origin in “the toleration and neighbourliness” of the previous landholders, “it may be no bad thing that the good nature of earlier generations should have a permanent memorial.”<sup>242</sup>

At common law use alone is simply evidence of an implied dedication. There is no fixed period during which public use must continue in order to constitute evidence that a landowner has dedicated land to the public for public use. Use for a period of 18 months has been held sufficient to justify an inference of dedication.<sup>243</sup> Other presumptions of dedication rest on use for 3 years,<sup>244</sup> 7 years,<sup>245</sup> 40 years,<sup>246</sup> and 100 years.<sup>247</sup> In England, use of land for 20 years is generally considered the appropriate gauge for the establishment of public rights in respect of land in conformity with the statutory requirements in section 2 of the Prescription Act 1832 (Eng) and section 22(1) of the Commons Registration Act 1965 (Eng) for the establishment of village greens and commons by use as of right.<sup>248</sup>

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<sup>241</sup> (1881) 6 App Cas 740 at p 773 (Fry J) followed also in *R v Sunderland City Council ex parte Beresford* [2003] UKHL 60 at paras [76] (Lord Walker of Gestingthorpe), [2004] 1 AC 889, [2003] 3 WLR 1306.

<sup>242</sup> [1947] Ch 67 at pp 85-86.

<sup>243</sup> *North London Railway Co v Vestry of St Mary, Islington* (1872) 27 LT 672.

<sup>244</sup> *Rowley v Tottenham UDC* [1914] AC 95.

<sup>245</sup> *R v Petrie* (1855) 4 B & El 737, 119 ER 272.

<sup>246</sup> *Turner v Walsh* (1881) 6 App Cas 636 (Privy Council)

<sup>247</sup> *Gibbs v Village of Grand Bend* [1995] 129 DLR (4<sup>th</sup>) 449 (Ontario Court of Appeal).

<sup>248</sup> See *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [1999] UKHL 28, [2000] 1 AC 335.

In *Regina v Inhabitants of East Mark*,<sup>249</sup> Lord Denman CJ said: ‘If a road has been used by the public between forty and fifty years without objection, am I not to use it, unless I knew who has been the owner of it? The Crown certainly may dedicate a road to the public, and be bound by long acquiescence in public user. I think the public are not bound to inquire whether this or that owner would be more likely to know his rights and to assert them; and that we have gone quite wrong in entering upon such inquiries. Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible.’”

And in *Turner v Walsh*,<sup>250</sup> it was held that dedication from the Crown or private owner, as the case may be, may and ought to be presumed from long-continued user of a way by the public in the absence of anything to rebut the presumption; and the same presumption should be made in the case of Crown lands in the then Colony of New South Wales, although the nature of the user and the weight to be given to it may vary in each particular case. In the *Turner* case, the land was purchased from the Crown in 1879, under an Act passed in 1861. It appeared that for forty years before the commencement of the action there had been a road over and across the piece of land granted to the plaintiff which had been used by the public with carriages and on foot, and was the main road between two places. The mail coaches travelled the road, and teamsters conveying the produce of the country used it; and, in fact, it had been used by the public for all purposes, during this period, without interruption. The Privy Council held that upon such evidence the Judge would be right, unless there was some positive restriction on the power of the Crown, in directing the jury that they might presume a dedication of the road by the Crown to the public. The presumption of dedication may be made where the land belongs to the Crown or to a private owner, as the case may be, and, in the absence of anything to rebut the presumption, may and indeed ought to be presumed.<sup>251</sup>

And the caselaw is not limited to factual circumstances in respect of roads and public rights of way. Dedication may be presumed in cases where the public have used a park and beach

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<sup>249</sup> (1848) 11 QB 877 at p 882.

<sup>250</sup> (1881) 6 App Cas 636 (Privy Council) at p 642.

<sup>251</sup> [1913] 13 DLR 649 (Ontario Supreme Court, Appellate Division) at p 654-655

for swimming and recreation: this was the factual circumstance of *Gibbs v Village of Grand Bend*,<sup>252</sup> cited above. Indeed, argument was made before the court in *Gibbs* that there might be some divergence in the application of the common law relating to the establishment of public rights at public places such as beaches and parks, as opposed to the establishment of public rights of passage on public roads. In responding to this argument Justice Brooke disapproved the opinion of the trial judge stating, at page 482,

“In [the trial judge’s] reasons, he accepted the respondents’ submission that public use and dedication generally involve rights of passage and that the courts have been reluctant to extend the doctrine of dedication to cases in which the use is not for public necessity. The trial judge then indicated that the use of land for recreational purposes cannot, in law, give rise by itself to an inference of dedication. Perhaps such a proposition was tenable in other days, but today’s attitude favouring playgrounds, greenbelts, parks and the requirement in modern planning that land be set aside, or dedicated, for such recreational purposes is because facilitating public recreation is a matter of public necessity.

“Furthermore, the authorities do not entirely support the trial judge’s conclusions. In *Wright and Maginnis v Village of Long Branch* (1959) 18 DLR (2d) 1, [1959] SCR 418, the court was concerned with a claim that land had been dedicated for the purpose of the erection and maintenance of a war memorial. There was a question about the effect of this dedication on the title of the owner and whether the owner, having dedicated the land to the public for a particular use, retained the title subject to the public’s right to use the property for such use. Rand J answered that question in the affirmative. In delivering the judgment, Rand J adopted what had been said by Clute JA in *Re Lorne Park* (1914) 33 OLR 51 at pp 59-60, 22 DLR 350 (abridged) (SCAD), where he referred to 13 Cyc 444 (IV A):

“The doctrine expounded in the early English cases was applied to highways, but was gradually extended to all kinds of public

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<sup>252</sup> [1995] 129 DLR (4<sup>th</sup>) 449 (Ontario Court of Appeal).



easement, such as squares, parks, wharves etc.... The full applicability of the doctrine of dedication to parks and public squares and commons is now generally recognised, and where land is dedicated for a public square without any specific designation of the uses to which it can be put, it will be presumed to have been dedicated to such appropriate uses as would under user and custom be deemed to have been fairly in contemplation at the time of the dedication.”

Thus, it is not incorrect to argue that a public right to recreation exists at all public places which are dedicated to public use and which it is reasonable to contemplate would be used for recreative activities by members of the public at the time when they were so dedicated.

## 8. Use as of right

The long use of a place by the public for a particular purpose, whether that be for passage, recreation, or swimming, etc, is a factual circumstance supporting not only the implied dedication of land to the public for public use but also supporting a finding by the courts as to the creation or existence of a public right. Courts have declared that public rights can arise either at common law or under statute **as of right**, concomitant with the use of land and a presumption that land is dedicated to the public for public use. In this sense, the public, by virtue of their long uninterrupted use of land, create their own public right in respect of the land in question. Their use of land must not be secret, by force or under license: *nec vi, nec clam, nec precario*.<sup>253</sup> As Tomlin J observed in *Hue v Whiteley*,<sup>254</sup> members of

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<sup>253</sup> *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [1999] UKHL 28, [2000] 1 AC 335 at pp 350, 351, and 353-354, following *Earl de la Warr v Miles* (1881) 17 Ch D 535 at p 596 (Cotton LJ) and *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229 at p 239 where Lord Lindley said that the words ‘as of right’ were intended “to have the same meaning as the older expression *nec vi nec clam nec precario*.” *Sunningwell* was followed by the House of Lords in *R v Sunderland City Council ex parte Beresford* [2003] UKHL 60 at para [3] (Lord Bingham of Cornhill), and at para [16] Lord Scott), [2004] 1 AC 889, [2003] 3 WLR 1306. Also, *Merstham Manor Ltd v Coulson and Purley UDC* [1937] 2 KB 77 at pp 82-84 (Hilbery J); *Jones v Bates* [1938] 2 All ER 237 at p 245 (Scott LJ). See further T Bonyhady *The Law of the Countryside, The Rights of the Public* (Professional Books Abingdon 1987) at pp 29-38.

<sup>254</sup> [1929] 1 Ch 440 at p 445 cited with approval in *Jones v Bates* [1938] 2 All ER 237 at p 241 (Slessor LJ), at p 245 (Scott LJ); *Attorney-General and Newton Abbot RDC v Dyer* [1947] Ch 67 at p 85.

the public must merely “believe themselves to be exercising a public right...” to justify an implied dedication. In *Alfred F Beckett Ltd v Lyons*, Harman LJ that the phrase ‘as of right’ was commensurate with a belief of a public right: “The authorities seem to show that when the law talks of something being done as of right it means that the person doing it believes himself to be exercising a public right: *Jones v Bates* [1938] 2 All ER 237.”<sup>255</sup>

In *Hue v Whiteley*, the dispute was over the existence of a public footpath on Box Hill and the judge found that for 60 years people had “used the track to get to the highway and to the public bridle road as of right, on the footing that they were using a public way.”<sup>256</sup> Counsel for the landowner, relying on *Attorney-General v Antrobus* [1905] 2 Ch 188 (which concerned the tracks around Stonehenge), argued that the user should be disregarded because people used the path merely for ‘recreation’ in walking on Box Hill. Tomlin J said, at page 445, that this made no difference: “A man passes from one point to another believing himself to be using a public road, and the state of his mind as to his motive in passing is irrelevant. If there is evidence, as there is here, of continuous user by persons as of right (ie, believing themselves to be exercising a public right to pass from one highway to another), there is no question such as that which arose in *Attorney-General v Antrobus*.” Lord Hoffmann, giving judgment for the House of Lords in *Sunningwell* followed *Earl de la Warr v Miles*,<sup>257</sup> *Jones v Bates*,<sup>258</sup> and *Hue v Whiteley*,<sup>259</sup> stating: “[T]he whole English theory of prescription... as I hope I have demonstrated, depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose, the actual state of mind of the road user is plainly irrelevant.”

In *Earl de la Warr v Miles*, Cotton LJ discussed the meaning of the term ‘as of right’ in the Prescription Act of 1832 stating that use as of right was use, “not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done.”<sup>260</sup> Lord Hoffman approved of these words in *Sunningwell*, stating further: “The unifying element in these three vitiating circumstances was that each constituted a reason

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<sup>255</sup> [1967] Ch 449 at p 469.

<sup>256</sup> [1929] 1 Ch 440 at p 444.

<sup>257</sup> (1881) 17 Ch D 535 at p 596 (Cotton LJ).

<sup>258</sup> [1938] 2 All ER 237 at p 245 (Scott LJ).

<sup>259</sup> [1929] 1 Ch 440 at p 445 (Tomlin J).

<sup>260</sup> (1881) 17 Ch D 535 at p 596.

why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period.”<sup>261</sup> Adopting the expression ‘nec vi, nec clam, nec precario’, Lord Hoffmann interpreted and translated the phrase as ‘not by force, nor stealth, nor the licence of the owner’.<sup>262</sup> The theory of implied prescription is concerned only with how the matter would have appeared to the owner of the land, and not with the state of mind of individual users of land. Use of land by the public, which is apparently as of right, cannot be discounted merely because, as may often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not.<sup>263</sup> Citing *Parke B in Bright v Walker*,<sup>264</sup> Lord Hoffmann concluded that use must merely be had “openly and in the manner that a person rightfully entitled would have used it...”<sup>265</sup>

The decision in *Blundell v Catterall*, which has been regarded as precedent that there is no public right of recreation of the seashore, is perhaps deficient for not considering whether the recreation of swimming claimed as a public right in that case might arise from long uninterrupted use as of right. Recent decisions have confirmed that public rights to use of public spaces for recreation can exist **as of right**.

In *North Cronulla Precinct Committee Inc v Sutherland Shire Council*, Sheller JA declared that the acquisition of rights of way by use may be established simply by long user: “In the context of the acquisition of rights of way by use, the expression ‘as of right’ has been employed to denote a use of land without force or stealth or licence (*nec per vim, nec clam, nec precario*). The claimants used the land as though they had a right to do so and in ways that to a reasonable landowner would indicate that they believed they were exercising such a right. Such use could be evidence either of an intention by the owner to dedicate the land to that use or that

<sup>261</sup> [1999] UKHL 28, [2000] 1 AC 335 at p 350, [1999] 3 WLR 160 at p 168 (Lord Hoffmann).

<sup>262</sup> [2000] 1 AC 335 at p 350 (Lord Hoffmann), following *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229, 238, 239 (Lord Davey) and (Lord Lindley). Followed in *R v Sunderland City Council ex parte Beresford* [2003] UKHL 60 at para [55], [2004] 1 AC 889, [2003] 3 WLR 1306 (Lord Roger of Earlsferry).

<sup>263</sup> [1999] UKHL 28, [2000] 1 AC 335 at pp 353-354, [1999] 3 WLR 160 at p 171 (Lord Hoffmann).

<sup>264</sup> (1834) 1 C M & R 211 at p 219, 149 ER 1057 at p 1060.

<sup>265</sup> [1999] UKHL 28, [2000] 1 AC 335 at p 350, [1999] 3 WLR 160 at p 168 (Lord Hoffmann).

there had in fact been such a dedication.”<sup>266</sup> In *North Cronulla Precinct Committee* the Court of Appeal of New South Wales held that land vested in the Sutherland Shire Council pursuant to the Local Government Act 1993 (NSW) was a public park owing to the use of the land by members of the public for a period of 8 years as a park for recreation. With the acquiescence of the respondent Council, who did not use the land for any purpose, the public came and went on the land in a way which could only suggest that they believed that they had the right to use the land as a park. The Council was estopped from reclassifying the land.

In *R v Doncaster Metropolitan Borough Council ex parte Braim*,<sup>267</sup> McCullough J held that a public right of recreation can be created at common law based on long use. The applicant, Mr Braim, applied by way of judicial review for a declaration that an area of land known as Doncaster Common which was owned by the Doncaster Metropolitan Borough Council constituted an ‘open space’ within the meaning of section 123(2A) of the Local Government Act 1972. His application was prompted because of the corporation’s intention to grant a lease giving exclusive possession of part of the land to the Town Moore Golf Club whose intention was to erect a new clubhouse thereon. One part of the common was a race course upon which the St Leger was run, racing having taken place there since about 1600. Another part of the common had been used since 1894 for playing golf. Evidence showed that people had been walking over the common for many years, and that now it was used also for jogging, flying kites and model aeroplanes, and picnicking, and that children kicked balls about and played tennis, french cricket and the like.<sup>268</sup>

Argument was made that any public right to use the land must derive from section 193 of the Law of Property Act 1925 (UK) and that, if any public right existed, such was extinguished because the land in question had not been registered under the Commons Registration Act 1965 (UK), and there was no evidence of any grant or dedication since then. His Lordship concluded, however, that prior to 1926 the rights of user of the common by the public did not depend upon tolerance or permission of Doncaster Corporation; that at

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<sup>266</sup> [1999] NSWCA 438 at para [4] citing with approval *Brodie v Mann* [1885] 10 App Cas 378, *Poole v Huskinson* (1843) 11 M & W 830; 152 ER 1039, and *R v Oxfordshire County Council; ex parte Sunningwell Parish Council* [1999] UKHL 28, [1999] 3 WLR 160 at p 168, at paras [5] and [6] (Sheller JA).

<sup>267</sup> The Times 11 October 1986.

<sup>268</sup> *ibid.*

no stage was there anything to suggest the public's use was on sufferance only, and that there had been no assertion of any right to end such use before the present dispute arose. The only reasonable factual inference to be drawn was that from some date prior to 1860 the public had used the common for recreation as of right. The fact that the common had not been registered under the Commons Registration Act 1965 (UK) could not detract from those pre-existing rights. Further, it was a right of use which was neither an easement nor based on custom such as local inhabitants might enjoy over a town or village green. His Lordship considered *In re Ellenborough Park* ((1956) 1 Ch 131), *Tyne Improvement Commissioners v Imrie* ((1899) 81 LT 174), *Goodman v Mayor of Saltash* ((1882) 7 App Cas 633) and *Attorney-General v Antrobus* ((1905) 2 Ch 188) and found that the law allowed the court to presume that at some time prior to 1860 a public right of recreation over the common was validly granted. The public's use of Doncaster Common for purposes of recreation was not only lawful but as of right.

In *Gibbs v Village of Grand Bend*,<sup>269</sup> it was held by the Ontario Court of Appeal that open and unobstructed use of land by members of the public for recreational purposes, for a substantial period of time, can give rise *by itself* to the creation of a public right. The existence of a public right is not dependent on ownership of the land, but rather arises in consequence to the use which the public make of the land. Whilst the court on one hand found that public's use of the land leads to an inference that the land has been dedicated to the public for recreational purposes, irrespective of who owns the land,<sup>270</sup> respecting public rights, Brooke JA said: "...[T]he public rights are separate from ownership by the Crown or the municipality..." Even a denial by a municipal authority that the public has a right to the use of land, whether that land be a beach for their recreation, or a road for their travel, will not extinguish the existence of the public right.<sup>271</sup> The sole criteria for the existence of a public right in respect of a public place, whether it be a right to travel, to free passage, or to use of a place for recreation or physical exercise, is the uninhibited exercise of that right. In *Gibbs v Village of Grand Bend*, the public made use of a private lakeside beach for recreational

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<sup>269</sup> [1995] 129 D.L.R. (4th) 449 (Ontario Court of Appeal).

<sup>270</sup> *ibid* at pp 482-484.

<sup>271</sup> *Gibbs v Village of Grand Bend* [1995] 129 D.L.R. (4th) 449 at p 481 (Brooke JA), citing, with approval, *Foothills No 31 (Municipal District) v Stockwell* (1985) 39 R.P.R. 82, [1986] 1 W.W.R. 668, 41 Alta L.R. (2d) 184 (CA) (Kerans JA) at pp 85-6.

purposes over a period of 100 years. There was no evidence of dedication of the fee simple pertaining to the beach to the public for public use; yet the court found that a dedication of the land to use by the public for recreational purposes could be inferred. Brooke JA was of the opinion that an inference could clearly be drawn that the beach was dedicated to the public for their recreation, since the evidence showed that the beach had been habitually used for recreational purposes since before the turn of the nineteenth century and the successive owners did not prevent, but encouraged such use. Accordingly, the public could continue to use the beach for recreational purposes.<sup>272</sup>

Regarding public rights to use of beaches for their recreation, Brooke JA said at page 483:

“Dedication of the use of beaches to the public for recreational purposes has been the subject of but one reported case in this country to which we were referred: see *Carpenter v Smith* [[1951] 2 DLR 609 (Ont Co Ct)]. It is, however, an area in which there have been a number of decisions in the United States of America. An American body of case law has developed concerning the dedication of beaches and shoreline of public waterways to the public for recreational purposes. In many of these cases, the claim for such a declaration has succeeded. Of course, in considering those cases, care must be taken to discern the possible significance of the relevant state constitution or other statute. However, the same common law principles applicable in cases of dedication in the American cases are generally applicable here. In an article entitled ‘Coastal Recreation: Legal Methods For Securing Public Rights In The Sea Shore’, found in 33 Me L Rev 69, the author, J Curtis states at p 84:

‘In recognition of a long continued public usage of the dry shore, courts in California, Florida, New York, Oregon, and Texas have recently applied the doctrines of prescription, dedication and custom to establish public rights in coastal beaches above the high water mark. Refer to, *Gion v City of Santa Cruz*, *Dietz v King* 2 Cal 3d 29, 465 P 50 (California Supreme Court, 1970); *Seaway Co v Attorney General* 375 SW 2d 923 (Tex Civ App Ct 1964).”

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<sup>272</sup> *ibid* at pp 481-82 (Brooke JA), at pp 478-479 (Finlayson JA).

Public rights may arise wherever members of the public make habitual use of land uninhibited by the owner of that land. If the public make use of a public place such as a public beach or a public park for their recreation and enjoyment uninterrupted by the owner of the land, and for a substantial period of time, then a public right will arise. Thus, if the people use a beach for their recreation, uninhibited and for a substantial period of time, then the people have a *public right to use the beach for recreation*. If the people use the foreshore for swimming or bathing, uninhibited and for a substantial period of time, then the people have a *public right to use of the foreshore for swimming and bathing*. If the people use a park for recreation or leisure, uninhibited and for a substantial period of time, then the people have a *public right to use of the park recreation and leisure*. Courts have recognised a public right to recreation at beaches, encompassing rights to swim at the foreshore and walk on the beach;<sup>273</sup> at commons, encompassing rights to walk, jog, picnic, fly kites, play ball games and french cricket;<sup>274</sup> and at public parks.<sup>275</sup> This public right to use of public places for recreation and enjoyment is a public right capable of juxtaposition with a publicly exhibited sporting event. A publicly exhibited sporting event may create a public nuisance at a public beach, public park or common, if such sporting event obstructs, interferes with or causes discomfort or annoyance to the public in the exercise of their public right to recreation.<sup>276</sup> It is the public right to use of the public space for recreation which can be impinged upon in such instances.

## 9. The village green cases

A series of litigations concerning the registration of land as village greens and the rights of the public arising in respect of such registration in England has been considered by the

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<sup>273</sup> *Gibbs v Village of Grand Bend* [1995] 129 DLR (4th) 449 (Ontario Court of Appeal).

<sup>274</sup> *R v Doncaster Metropolitan Borough Council ex parte Braim* The Times 11 October 1986.

<sup>275</sup> *North Cronulla Precinct Committee Inc v Sutherland Shire Council* [1999] NSWCA 438 (Court of Appeal for New South Wales).

<sup>276</sup> This contention is supported by the caselaw holding that the public right of way, the public right to quietude, the public right to comfort, the public right to safety, the public right to health and the public right to life may each be the subject of the common injury requirement in public nuisance suits. Note Part 2 of this thesis. See, *Gibbs v Village of Grand Bend* [1995] 129 DLR (4th) 449 (Ontario Court of Appeal); *R v Doncaster Metropolitan Borough Council ex parte Braim* The Times 11 October 1986; *North Cronulla Precinct Committee Inc v Sutherland Shire Council* [1999] NSWCA 438 (Court of Appeal for New South Wales).

House of Lords. Three cases are useful to this thesis and support the legal principle that use of land **as of right** creates public rights of recreation – *R v Oxfordshire County Council ex parte Sunningwell Parish Council*,<sup>277</sup> *R v Sunderland City Council ex parte Beresford*,<sup>278</sup> *Oxfordshire County Council v Oxfordshire City Council*.<sup>279</sup> The House of Lords dicta arose following judicial review of local government decisions refusing registration of land as a village green pursuant to section 22 of the Commons Registration Act 1965 (UK). These judgments address the meaning of ‘use as of right’ under the statute and at common law, and the creation of public rights from ‘use as of right’ instances. These dicta are useful for our understanding how public rights can arise in respect of the use of land, and of what is the legal effect of such public rights once established.

In *R v Oxfordshire County Council ex parte Sunningwell Parish Council*,<sup>280</sup> the House of Lords ordered the Oxfordshire County Council to register a glebe which had been used by members of the public for “such outdoor pursuits as walking their dogs, playing family and childrens’ games, flying kites, picking blackberries, fishing in the stream and tobogganing down the slope when snow falls” as a village green on the basis that the public’s use of the glebe gave rise to a public right to use of the glebe. Pursuant to section 22(1) of the Commons Registration Act 1965 (UK) the parish council had applied to the County Council to register the glebe as a village green in order to forestall a council plan to build two houses on the glebe which the parish very much opposed. The principal issue in the *Sunningwell* case was whether the public, whose use of the land for sports and pastimes was relied on as constituting the requisite use ‘as of right’, had to use the land in the belief that they had the right to do so. The House held that they did not have to have a personal belief in their right to use the land. It was sufficient that their use of the land, objectively evaluated, appeared to be a use as of right.

Lord Hoffmann’s dicta addressing the meaning of the term ‘use as of right’ within the Act, and rejecting the requirement of a subjective state of mind by people using the land in accordance with the common law, has been assessed above. But Lord Hoffmann also

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<sup>277</sup> [1999] UKHL 28, [2000] 1 AC 335, [1999] 3 WLR 160.

<sup>278</sup> [2003] UKHL 60, [2004] 1 AC 889, [2003] 3 WLR 1306.

<sup>279</sup> [2006] UKHL 25 [2006] 2 AC 674, [2006] 2 WLR 1235.

<sup>280</sup> [1999] UKHL 28, [2000] 1 AC 335, [1999] 3 WLR 160.



discussed the effect of ‘use as of right’ and, in particular, whether such use created a public right to recreation. The County Council objected to the registration of the land in question as a village green because the use of the land was for solitary or family activities such as the walking of dogs and playing children’s games, such activities not being “sports and pastimes” as required under the Act. His Lordship rejected this argument, holding that use of land for solitary and family pastimes included use of land for recreation and sport. His Lordship also stated that even sporadic and trivial use of land might give rise to a right to use land for recreation. Lord Hoffmann stated: “I agree with Carnwath J in *Reg v Suffolk County Council, Ex parte Steed* (1995) 70 P & CR 487, 503, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green. It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right.” The effect of this dicta is that, where the public make use of land for personal sedentary purposes, even in a minimal intermittent manner, the law will regard that use as inclusive of all types of recreation, sports, pastimes and activities, and not only those of a minimal intermittent or sedentary nature. This issue would be revisited in the *Oxford County Council 2006* case.

A further argument raised by the County Council in *Sunningwell* was that the use of the land by members of the public had been tolerated by the Council and that this toleration was inconsistent with the user having been as of right. This argument would be revisited in *ex parte Beresford*, discussed further below, but Lord Hoffmann dealt with this argument by simply stating: “In my view, that proposition is fallacious. As one can see from the law of public rights of way before 1932, toleration is not inconsistent with user as of right.”<sup>281</sup>

In *R v Sunderland City Council ex parte Beresford*,<sup>282</sup> the question which the House of Lords considered was whether use as of right could be claimed where the public’s use of land for sports and recreation was actually tolerated and encouraged by the landowner. Could the court infer an implied licence by the landowner sufficient to quash a claim of use by right? It was not suggested that the Council had expressly licensed the public’s use of the land, either

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<sup>281</sup> [1999] UKHL 28, [2000] 1 AC 335, [1999] 3 WLR 160 at p 173, citing *Mills v Silver* [1991] Ch 271 at p 281 (Dillon LJ) and referring to the Rights of Way Act 1932 (Eng).

<sup>282</sup> [2003] UKHL 60, [2004] 1 AC 889, [2003] 3 WLR 1306.

in writing or orally. The argument was accordingly directed to whether it was ever possible to imply a licence by a landowner to use land in the manner prescribed, and, if so, whether the facts could properly be held to give rise to such an implication. On the facts, the public made use of an area called the 'Sports Arena' close to the centre of the town of Washington, Tyne and Wear. The Council had mown the grass and had installed many years previously a double row of wooden benches, sufficient to accommodate 1100 people. Also, a non-turf cricket wicket was laid down in 1979. The Sports Arena has been used for various recreational activities, ranging from team games to the walking of dogs. In 1998 the Council granted planning permission for the erection of a college of further education on land which included the Sports Arena. This proposal was opposed by a number of local residents who have been accustomed to use the Sports Arena for recreational activities and who desired to go on doing so. They made an application in 1999 for the Sports Arena to be registered under the 1965 Act as a town or village green.

The House followed Lord Hoffmann's dictum that use 'as of right' meant use 'nec vi, nec clam, nec precario'.<sup>283</sup> The House then turned to consider the effect of the term 'nec precario', without licence. Some members viewed the Council's actions as not capable of amounting to licence because those actions were equivocal and could in no way indicate that the public had no legal right to use the land and did so only by virtue of the council's licence.<sup>284</sup> Other members accepted that the Council encouraged the public to use the land and that the Council gave implied consent to the recreational use of the land by the public,<sup>285</sup> but nonetheless held that even encouragement or express or implied consent could defeat a use 'as of right'. Lord Scott concluded:

“It is clear enough that merely standing by, with knowledge of the use, and doing nothing about it, ie toleration or acquiescence, is consistent with the use being ‘as of right’... But I am unable to accept either that

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<sup>283</sup> “...[T]he words ‘as of right’ import the absence of any of the three characteristics of compulsion, secrecy or licence— ‘nec vi, nec clam, nec precario’, phraseology borrowed from the law of easements...” (*Jones v Bates* [1938] 2 All ER 237 at p 245 (Scott LJ) cited by Lord Hoffmann at [2000] 1 AC 335 at p 355) and applied at [2003] UKHL 60 at para [16] (Lord Scott of Foscote). “[I]n *Gardner v Hodgson’s Kingston Brewery Co Ltd* [1903] AC 229, 238, 239 both Lord Davey, impliedly, and Lord Lindley, expressly, had held that these words in the 1832 Act were intended to have the same meaning as the older expression ‘nec vi, nec clam, nec precario’. Lord Hoffmann adopted that interpretation and translated the phrase as ‘not by force, nor stealth, nor the licence of the owner’: [2000] 1 AC 335, 350H.” ([2003] UKHL 60 at para [55] (Lord Roger of Earlsferry).

<sup>284</sup> [2003] UKHL 60 at para [7] (Lord Bingham of Cornhill).

<sup>285</sup> *ibid* at para [48] (Lord Scott of Foscote).

an implied permission is necessarily in the same state as mere acquiescence or toleration or that an implied permission is necessarily inconsistent with the use being as of right. Indeed, I do not, for the reasons I have given, accept that even an express permission is necessarily inconsistent with use as of right.”<sup>286</sup>

Neither encouragement of the public’s activities, nor tolerance, amounts to a licence. What was required by a landowner to defeat a claim to use of land ‘as of right’ for purposes of recreation or sedentary leisure was the exercise of the revocable will of the landowner. Such revocable will was to be evidenced by some overt act indicating that the public’s use of the land is temporary and not permanent and subject to the will of the landowner. Overt acts can be express acts, as Lord Roger highlighted: “Prudent landowners will often indicate expressly, by a notice in appropriate terms or in some other way, when they are licensing or permitting the public to use their land during their pleasure only.”<sup>287</sup> Or overt acts could be implied from the facts in a manner suggested by Lord Walker: “[I]mplied permission could defeat a claim to user as of right... provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers. Such actions have an impact on members of the public and demonstrate that their access to the land, when they do have access, depends on the landowner’s permission.”<sup>288</sup> Unless an overt act exists which is capable of evidencing the landowner’s belief that he licenses that public’s use of his land for recreation during his pleasure only, the public will have claimed a right of recreation by long use as of right.

In *Oxfordshire County Council v Oxfordshire City Council*,<sup>289</sup> the House of Lords again considered the effect of a registration of land as a village green. The issue that the House addressed on this occasion was whether rights of recreation arising consequent to use of land as of right, and the registration of that land as a village green, were substantive rights. Lord Hoffmann highlighted the visceral concerns raised by the competing interests of the Council and the

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<sup>286</sup> *ibid* at para [43] (Lord Scott of Foscote).

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<sup>288</sup> *ibid* at para [83] (Lord Walker of Gestingthorpe).

<sup>289</sup> [2006] UKHL 25 [2006] 2 AC 674, [2006] 2 WLR 1235.

local inhabitants of Oxford: “[T]he interest of the city council in these questions is concrete in the most literal sense. They wish to build houses on the land. If registration creates no rights and the land does not fall within the Victorian statutes, they will be able to do so. If it does create rights or fall within the statutes, they will not be able to use the land in a way which wholly excludes the local inhabitants from using it for any sports or pastimes whatever.”<sup>290</sup>

Their Lordships, by majority, held that use of land as of right (such use leading to registration of land as a village green pursuant to section 22(1) of the Commons Registration Act 1965 (Eng) on the facts) entitled the public to substantive recreative rights of user over it.<sup>291</sup> Speaking of sections 10 and 22(1) of the Commons Registration Act 1965 (Eng), Lord Hoffmann stated:

“Although the Act provides for the registration of rights of common, it makes no provision for the registration of rights of recreation. One cannot tell from the register whether the village green was registered on the basis of an annual bonfire, a weekly cricket match or daily football and rounders. So the establishment of an actual right to use a village green would require the inhabitants to go behind the registration and prove whatever had once satisfied the Commons Commissioner that the land should be registered.”

This possible outcome, however, proved to be unacceptable to the House, which held that land registered as a town or village green can be used generally for sports and pastimes. Lord Hoffmann concluded his analysis of the law by stating:

“It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner whether it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the *Sunningwell* case [2000] 1 AC 335, 357.”

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<sup>290</sup> *ibid* at para [45] (Lord Hoffmann).

<sup>291</sup> *ibid* at paras [49]-[50] (Lord Hoffmann) and at para [106] Lord Scott of Foscote concurring on this point.

Referring to common law precedents Lord Hoffmann noted that in *Mounsey v Ismay* (1863) 1 H & C 729 (horseracing on arable land on Kingsmoor, outside Carlisle), *Virgo v Harford* (unreported) 11 August 1892 (noted in Hunter, *The Preservation of Open Spaces* (1896) at pp 181-182) (football, rounders and cricket on 65 acres of open land on a hill outside Walton-in-Gordano in Somerset) and *Lancashire v Hunt* (1894) 10 TLR 310 (cricket and other games on 160 acres of Stockbridge Common Down) the courts upheld recreational customs on land which bore no resemblance to the village greens.

The effect of their Lordships decisions is that the public may claim actual substantive rights of recreation in respect of land which they use uninterrupted for a period of 20 years pursuant to registration of that land as a village green. Whilst the decisions may be limited in that they concern the establishment of recreational land under the Commons Registration Act 1965 (Eng), the dicta deals extensively with common law precedents and touches on common law rules. Their Lordships judgments reflect a synchronicity between the Roman law, Scottish law, the common law, and legislation. Lord Hoffmann's dicta, particularly, evidences a determination to support and maintain a consistency in the principles underlying the method by which public rights of recreation might arise in respect of the use of land.

## 10. Concluding remarks

Publicly exhibited sporting events utilising public beaches, public parks, and public roads, such as triathlon events, surfing championships, Ironman sports, and beach volleyball, pose a fresh factual scenario for the common law offence of public nuisance. Triathlon, in particular, is a new sport, having been devised some twenty years ago and becoming popular only in the past decade. That public nuisance is extendable to cover such sports is logical. Where publicly exhibited sporting events are staged at beaches and parks, parts of the beach or park are invariably cordoned off by metal barriers bearing posters of sponsors of the sporting event; temporary stands are built for the exclusive use of the management of companies sponsoring the sporting event; and television crews often build temporary studios on the beach. Beachgoers, and members of the public using parks where a race is staged are

told to move, are told that they cannot use the beach or the park for their own recreation and enjoyment, and members of the public walking along a street where a race is staged are prohibited from taking their usual route. In all circumstances there is disregard of the public's rights.

Public rights arise in respect of the use of land consequent to either formal dedication of land to the public for public use or implied dedication of land by long uninterrupted use of land by the public. Courts have long recognised a public right to navigation and a public right to fishing on the sea and seashore. Courts in the United States have recognized a public right of swimming or bathing on the sea and seashore. Courts have also now recognized a public right to recreation at public places reserved for public use such as beaches and parks. Public rights of recreation will arise in respect of town or village greens or commons registered pursuant to statute, or at common law, from long uninterrupted use of land as of right.

It is clear from the analysis of the caselaw herein, in concert with the analysis of public nuisance precedents in Parts 2 and 3 of this thesis, that the use of the beach, seashore, and the surf, at a particular location, and the appropriation of such a location, for the staging of public exhibitions of sports, by a private entity for profit or personal interest, is a public nuisance. The same holds for other public places such as parks. The caselaw holding that sporting events may create a public nuisance by obstructing or interfering with the public's right of way on the highway are equally applied in respect of all public land. In respect of beaches, parks, town or village greens, or commons, the public right which a publicly exhibited sporting event would obstruct or interfere with is the public right of recreation.

The use of the beaches, the seashore, and the surf by beach and surf sporting events, prevents the public from exercising their right of free use along the beach for recreation, walking, running, or laying on the beach. Such sporting events also disallow the public right to swim in the sea, surf the waves, fish, and enjoy the water. A public nuisance is created in these circumstances because there is interference with or obstruction to members of the public in the exercise of their public right to use of the beach or park for their recreation or enjoyment. There may also be interference with or obstruction to the public in the exercise

of the public right to navigation, the public right to fishing, or the public right of passage along the foreshore. There is no question of balancing the public right against the interests of the individuals who desire to make use of a public place exclusive of the public for their personal profit. *Any* hindrance of the public right at a public place may be a public nuisance at common law. This is an important aspect of the law of public nuisance as applied to the human activity of sport. The use of public beaches or parks for recreation is not a **privilege** bestowed by a municipal authority, despite the view of Abbott CJ in *Blundell v Catterall* that use of the foreshore for recreation is merely a privilege tolerated by the Crown and not a public right. Such use is a **right** and such use can exist even if a municipal authority denies the existence of the public right as was held in *Gibbs v Village of Grand Bend*,<sup>292</sup> and *North Cronulla Precinct Committee Inc v Sutherland Shire Council*.<sup>293</sup>

Publicly exhibited sporting events may create public nuisances not only because the athletes competing in them appropriate, for their own personal profit, a part of the beach or surf, thereby interfering with the public's right to use of that part of the beach or surf for physical exercise of recreation, but also because the sporting events draw crowds to the public place, exacerbating the obstruction or interference of public rights. There are thus two grounds upon which a publicly exhibited sporting event staged at a beach may create public nuisances: (1) on the ground that the use of the beach, sea or seashore obstructs, inconveniences or causes discomfort to the public in the exercise of their public right of navigation on the sea and seashore, or their public right of fishing, or their public right to use the beach, sea and seashore for recreation; and (2) on the ground that the staging of the sports draws together thousands of people to the beach and public roads near the beach, thereby obstructing, inconveniencing or causing discomfort to the public in the exercise of their public right of way along the highway, and to their public right to free use of the public beaches for their recreation. Spectators often crowd the beach to watch the sports, preventing or obstructing or inconveniencing the public right to use of the beach. The public's right to recreation at these public places, comprising of activities such as sunbathing, laying on the beach, walking, jogging, or running on the beach, kite flying, and swimming and surfing on the sea and seashore, is either obstructed or interfered with.

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<sup>292</sup> [1995] 129 DLR (4<sup>th</sup>) 449 (Ontario Court of Appeal).

<sup>293</sup> [1999] NSWCA 438 (3 December 1999) (Court of Appeal for New South Wales).

The fact that there may be a wide expanse of beach and surf for the public to use, or there may be other areas in a park or common outside the area or location appropriate for a sports competition which the public could access during the staging of a publicly exhibited sporting event, is immaterial. The public right to free use of all the beach, and all the sea and seashore, or a park or common, including the place where the public sporting event is taking place, is sacrosanct at all times at common law. This public right is inviolable. It matters not that there may be other beaches nearby to where the obstruction occurs to which the public may go. A public nuisance is nonetheless created.<sup>294</sup>

What is true for beaches and the foreshore, is also true for other public spaces such as parks, town or village greens, or commons, albeit that the public right which is obstructed or interfered with would not be a public right of navigation and, rather, a public right of way or a public right of recreation. Only legislative intervention may extinguish the public right created by public use. At beaches and parks, the public right to use of and enjoyment of the beach or park is paramount. Any derogation or diminution of the public right, or any discomfort caused to the public in the exercise of their public right by using it in a manner inconsistent with its use by the public or by excluding the public from use of it by virtue of a commercial purpose, is a public nuisance.

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<sup>294</sup> Note *Schubert v Lee* [1946] HCA 28, (1946) 71 CLR 589 at p 594, where Latham CJ, Rich and Dixon JJ, stated: “If a man deposits a load of stones in a highway there is no doubt that he obstructs the highway, even though the members of the public are able to walk round the stones and even though it is not proved that any member of the public actually endeavoured to use the highway while the stones were there. This is the view of the law which was adopted in *Haywood v Mumford* [1908] HCA 62, (1908) 7 CLR 133.”



## Chapter 4

### Public Rights & Natural Rights in Sport & Recreation

#### 1. Natural rights

*Natural rights* or *inalienable rights* are rights that are not dependant upon the laws, customs, or beliefs of a particular society or polity for their validity. In contrast, *legal rights* (sometimes also called *civil rights* or *statutory rights*) are rights promoted by a particular polity, codified into legal statutes by some form of legislature, and as such are interconnected with local laws, customs, and beliefs. Natural rights are universal. Legal rights are culturally and politically relative. Documents such as the United States Declaration of Independence and the Universal Declaration of Human Rights demonstrate the usefulness of recognizing natural rights because these documents ground otherwise aesthetic concepts in telluric form. Common law judgments may likewise ground these fragile rights.

Physical activity, or physical exercise, the principal component of any sport or recreation, may be considered a natural right of man in his private life. Whilst the United Nations Universal Declaration of Human Rights is sadly silent on the importance of sport and physical exercise to the human form, the Declaration mentions a right to leisure.<sup>295</sup> Presumably, leisure includes both sedentary and active leisurely pursuits.

Thomas Hobbes describes a natural right, or a *jus naturale*, as:

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<sup>295</sup> Article 24 of the United Nations Universal Declaration of Human Rights: Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)). Utilising the word 'leisure', Article 24 may be indicative of a human right to recreation, sport or physical activity.

“the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto.”<sup>296</sup>

Grotius, citing Cicero, writes:

“Cicero in the third book of his *Bounds of Good and Evil*, and in other parts of his works, proves with great erudition from the writings of the Stoics, that there are certain first principles of nature, called by the Greeks the first natural impressions, which are succeeded by other principles of obligation superior even to the first impressions themselves. He calls the care, which every animal, from the moment of its birth, feels for itself and the preservation of its condition, its abhorrence of destruction, and of every thing that threatens death, a principle of nature. Hence, he says, it happens, that if left to his own choice, every man would prefer a sound and perfect to a mutilated and deformed body. So that preserving ourselves in a natural state, and holding to every thing conformable, and averting every thing repugnant to nature is the first duty.”<sup>297</sup>

Montesquieu uses the concepts *droit naturel* and *loi naturel* interchangeably,<sup>298</sup> and provides a more complex view of natural rights than either Hobbes or Cicero. He writes of four principal laws of nature; being peace, nourishment, sexuality, and the desire of living in society.<sup>299</sup> Of these the first two are pertinent to our analysis here. Montesquieu formulated

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<sup>296</sup> *Leviathan* XIV 1; JCA Gaskin (ed) *T Hobbes: Leviathan* (OUP Oxford 1996) at p 86.

<sup>297</sup> H Grotius *De Jure Belli ac Pacis Libri Tres* Bk 1 ch 2 s 1: AC Campbell (tr) *H Grotius: The Rights of War and Peace* (M Walter Dunne London 1901) Bk 1 ch 2 s 1 at p 31. See also FW Kelsey (tr) *H Grotius: De Jure Belli ac Pacis Libri Tres* (Carnegie Institution of Washington Washington DC 1925) vol 2, Bk 1 ch 2 s 1.

<sup>298</sup> Montesquieu *De l'Esprit des lois* Bk 26. In book 26 of *The Spirit of the Laws*, Montesquieu writes on how the laws in general ‘should’ be. He lists nine ‘sorts’ of law from natural right and divine right down to civil and domestic right. He uses *droit naturel* and *loi naturel* interchangeably here, suggesting that the true spirit of the laws transcends any Scholastic or esoteric distinction between classical natural right, medieval natural law, and modern natural rights: PO Carrese *The Cloaking of Power – Montesquieu, Blackstone and the Rise of Judicial Activism* (University of Chicago Press Chicago 2003) at p 79, citing R Caillois (ed) *Oeuvres complètes de Montesquieu* (Bibliothèque de la Pléiade edn Gallimard Paris 1949-51) vol 2, Bk 26.

<sup>299</sup> Montesquieu *De l'Esprit des lois* Bk 1 ch 2: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 6; JV Prichard (ed) T Nugent (tr) *Montesquieu: The*

his complex theory of natural rights based on the physio-psychological dispositions or conditions of mankind that he considered natural to mankind, rather than stressing natural rights to life, liberty, and property, or the pursuit of happiness, as was common in the Enlightenment era.<sup>300</sup> He thus provides a very modern, somewhat scientific, theory of natural rights. Of humans, Montesquieu says: “Man as a physical being, is like other bodies governed by invariable laws...”<sup>301</sup> These laws are the laws of nature which,

“...derive uniquely from the constitution of our being. To know them well, one must consider a man before the establishment of societies. The laws he would receive in such a state will be the laws of nature...

A man in the state of nature would have the faculty of knowing rather than knowledge. It is clear that his first ideas would not be speculative ones; he would think of the preservation of his being before seeking the origin of his being. Such a man would at first feel only his weakness; his timidity would be extreme: and as for evidence, if it is needed on this point, savages have been found in forests; everything makes them tremble, everything makes them flee... In this state, each feels himself

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*Spirit of Laws* (G Bell and Sons London 1878) at pp 4-5; J Brethe de la Gressaye (ed) *Montesquieu: De l'Esprit des lois* (Société Les Belles Lettres Paris 1950) at pp 22-24; G Truc (ed) *Montesquieu: De L'Esprit des Lois* (Garnier Frères Paris 1949) at pp 7-9. And see PO Carrese *The Cloaking of Power – Montesquieu, Blackstone and the Rise of Judicial Activism* (University of Chicago Press Chicago 2003) at pp 20 and 77, citing R Caillois (ed) Pléiade edition *Oeuvres complètes de Montesquieu* (Gallimard Paris 1949-51) vol 2, Bk 23 chs 1, 7, 20 and 21; Bk 1 ch 2; Bk 3 ch 10; and Bk 6 ch 13.

<sup>300</sup> J Brethe de la Gressaye, talking of Book 26 of the *Esprit des lois*, says: ‘Les exemples choisis par Montesquieu révèlent sa conception – un peu étroite – du Droit naturel. Pour lui, les principes de Droit naturel découlent de réflexes élémentaires... Ce qui est Droit nature l’est instinctif, procédant de la biologie humaine ou d’une psychologie primitive.’ [The examples chosen by Montesquieu reveal his idea - slightly narrow – of natural rights. For him, the principles of natural rights follow from elementary reflexes... What is a natural right is instinctive, proceeding from human biology or a primitive psychology] (MH Waddicor *Montesquieu and the Philosophy of Natural Law* (Martinus Nijhoff The Hague 1970) at p 46, citing Brethe de la Gressaye). Further, Montesquieu implies in Book 26 chapter 6 that natural law should not be understood in terms of Christian precepts: see TL Pangle *Montesquieu’s Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at p 265.

<sup>301</sup> Montesquieu *De l'Esprit des lois* Bk 1 ch 1: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 5; JV Prichard (ed) T Nugent (tr) *Montesquieu: The Spirit of Laws* (G Bell and Sons London 1878) at p 3; J Brethe de la Gressaye (ed) *Montesquieu: De l'Esprit des lois* (Société Les Belles Lettres Paris 1950) at p 22 G Truc (ed) *Montesquieu: De L'Esprit des Lois* (Garnier Frères Paris 1949) at p 7.

inferior; he scarcely feels himself an equal. Such men would not seek to attack one another, and peace would be the first natural law.”<sup>302</sup>

Although Montesquieu believes that peace is the first law of nature, based on man’s sensitivity of his weakness, “Man would add the feeling of his needs to the feeling of his weakness. Thus another natural law would be the one inspiring him to seek nourishment.”<sup>303</sup> Montesquieu does not define ‘nourishment’, but we might safely conclude that this natural law comprises of all activities which aid the preservation of the human form and promote man’s life, ability, and strength to function in nature. Yet Montesquieu goes somewhat further in his analysis of natural rights and incorporates genteel humane qualities within the concept of natural right. These humane elements include a respect for one’s own health:

“...Montesquieu affirms his new conception of natural right, [by] tempering the Hobbesian and Lockean emphasis on self-preservation and natural liberty. These [elements of self-preservation and natural liberty] are legitimate in themselves, but they should also be means for securing ‘natural feelings’ such as ‘respect for a father, tenderness for one’s children and women, laws of honour, or the state of one’s health.’ Such a natural right is neither as base and harsh as that of Hobbes, nor as high and rational as that of classical and medieval political philosophy. It concerns the propriety of providing for our basic passions and interests – neither our lowest nor highest, but rather our humane, middling ones – in as mutually beneficial a manner as possible.”<sup>304</sup>

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<sup>302</sup> Montesquieu *De l’Esprit des lois* Bk 1 ch 2: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 6. Note also JV Prichard (ed) T Nugent (tr) *Montesquieu: The Spirit of Laws* (G Bell and Sons London 1878) at pp 4-5. See also DW Carrithers ‘Introduction: Montesquieu and the Spirit of Modernity’ in DW Carrithers and P Coleman (ed) *Montesquieu and the Spirit of Modernity* (Voltaire Foundation Oxford 2002) at p 26.

<sup>303</sup> Montesquieu *De l’Esprit des lois* Bk 1 ch 2: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 6; Another rendering of this passage is phrased: “Next to a sense of his weakness man would soon find that of his wants. Hence another law of nature would prompt him to seek for nourishment.” (JV Prichard (ed) T Nugent (tr) *Montesquieu: The Spirit of Laws* (G Bell and Sons London 1878) Bk 1, ch 2 at p 5). In French thus: “Au sentiment de sa faiblesse, l’homme joindrait le sentiment de ses besoins. Ainsi une autre loi naturelle serait celle qui lui inspirerait de chercher à se nourrir.” (G Truc (ed) *Montesquieu: De L’Esprit des Lois* (Garnier Frères Paris 1949) at p 8).

<sup>304</sup> PO Carrese *The Cloaking of Power – Montesquieu, Blackstone and the Rise of Judicial Activism* (University of Chicago Press Chicago 2003) at pp 33-34, citing R Caillois (ed) *Oeuvres complètes de Montesquieu* (Bibliothèque de la Pléiade edn Gallimard Paris 1949-51) vol 2, Bk 3 ch 10 at p 260.

Our basic need of wellbeing – encompassing peace, nourishment, the preservation of our being, and familial feeling – is thus our natural right.

That sport may be a natural right, adopting the definitions of natural right provided by Hobbes, Cicero, and Montesquieu, is supported by contemporary scientific and medical research. Sports, comprising of physical activity, are healthful, and physiologically and psychologically beneficial for human beings. There is now abundant scientific evidence to support the contention that physiological and psychological advantages are gained by a human being who engages in physical activity over and above a fellow human being not participating in any sport or recreation. Two major government sponsored reports in the United States (the *US Surgeon General's Report 1996*)<sup>305</sup> and in Australia (the *Australian Institute of Health and Welfare Report 2000*)<sup>306</sup> report on the many epidemiological scientific studies that have revealed the essential need of man for physical exercise. “Physical activity reduces the risk of premature mortality in general, and of coronary heart disease, hypertension, colon cancer, and diabetes mellitus in particular. Physical activity also improves mental health and is important for the health of muscles, bones, and joints.”<sup>307</sup> The *Australian Institute of Health and Welfare Report 2000* notes that:

“There is growing understanding of how physical activity affects physiologic function. The body responds to physical activity in ways that have important positive effects on musculoskeletal, cardiovascular, respiratory, and endocrine systems. These changes are consistent with a number of health benefits, including a reduced risk of premature mortality and reduced risks of coronary heart disease, hypertension, colon cancer, and diabetes mellitus. Regular participation in physical activity also appears to reduce depression and anxiety, improve mood, and enhance ability to perform daily tasks throughout the life span.”<sup>308</sup>

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<sup>305</sup> United States Department of Health and Human Services (USDHHS) Physical Activity and Health: a report of the Surgeon General (US Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion Atlanta GA 1996) <<http://www.cdc.gov/nccdphp/sgr/pdf/sgrfull.pdf>> (10 June 2004).

<sup>306</sup> T Armstrong, A Bauman and J Davies Physical Activity Patterns of Australian Adults, Results of the 1999 National Physical Activity Survey (Australian Institute of Health and Welfare Canberra 2000) <<http://www.aihw.gov.au/publications/health/papaa/papaa.pdf>> (10 June 2004).

<sup>307</sup> *US Surgeon General's Report 1996* (n 305) at p 4.

<sup>308</sup> *Australian Institute of Health and Welfare Report 2000* (n 306) at p 5.

Participation in physical activity throughout the lifespan can increase, maintain or reduce the decline of musculoskeletal health that generally occurs with aging in sedentary people. And participation by older adults can help maintain strength and flexibility, resulting in an ability to continue to perform daily activities.<sup>309</sup> People who partake of moderate to vigorous levels of physical activity and/or have high levels of cardiorespiratory fitness have a lower mortality rate than those with a sedentary lifestyle or low cardiorespiratory fitness.

The effects of physical activity on reducing mortality are strong and consistent across all studies and populations.<sup>310</sup> A study of men between 1958 and 1985 indicated that both moderate and intense levels of activity reduced overall risk of death even late in life. Both moderate and vigorous levels of activity were equally protective at age 50 years. The protective effect of high levels of activity lasted only until age 70, but the protective effect for moderate activity lasted beyond age 80.<sup>311</sup> Moderately intense sports activity can result in

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<sup>309</sup> See *Australian Institute of Health and Welfare Report 2000* (n 306) at p 8.

<sup>310</sup> *Australian Institute of Health and Welfare Report 2000* (n 306) at p 3, citing SN Blair and others 'Influences of cardiorespiratory fitness and other precursors on cardiovascular disease and all-cause mortality in men and women' (1996) 276(3) *The Journal of the American Medical Association* at pp 205–210; I Lee and R Paffenbarger 'Physical activity, fitness and longevity' (1997) 9 *Ageing* at pp 2–11; PJ Villeneuve and others 'Physical activity, physical fitness and risk of dying' (1998) 9 *Epidemiology* at pp 626–631; I Lee and R Paffenbarger 'Associations of light, moderate, and vigorous intensity physical activity with longevity' (2000) 151(3) *American Journal of Epidemiology* at pp 293–299. See also United States Department of Health and Human Services (USDHHS) *Physical Activity and Health: a report of the Surgeon General* (US Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion Atlanta GA 1996) <<http://www.cdc.gov/nccdphp/sgr/pdf/sgrfull.pdf>> (10 June 2004) at pp 85–86, citing ML Slattery and DR Jacobs Jr 'Physical fitness and cardiovascular disease mortality: the U.S. Railroad Study' (1988) 127 *American Journal of Epidemiology* at pp 571–580; ML Slattery DR Jacobs Jr and MZ Nichaman 'Leisure-time physical activity and coronary heart disease death: the U.S. Railroad Study' (1989) 79 *Circulation* at pp 304–311; L Sandvik and others 'Physical fitness as a predictor of mortality among healthy, middle-aged Norwegian men' (1993) 328 *New England Journal of Medicine* at pp 533–537; AS Leon and J Connett 'Physical activity and 10.5 year mortality in the Multiple Risk Factor Intervention Trial (MRFIT)' (1991) 20 *International Journal of Epidemiology* at pp 690–697; J Chang-Claude and R Frentzel-Beyme 'Dietary and lifestyle determinants of mortality among German vegetarians' (1993) 22 *International Journal of Epidemiology* at pp 228–236; GA Kaplan and others 'Mortality among the elderly in the Alameda County Study: behavioral and demographic risk factors' (1987) 77 *American Journal of Public Health* at pp 307–312; GA Arraiz DT Wigle and Y Mao 'Risk assessment of physical activity and physical fitness in the Canada Health Survey Mortality Follow-up Study' (1992) 45 *Journal of Clinical Epidemiology* at pp 419–428.

<sup>311</sup> *US Surgeon General's Report 1996* (n 305) at p 86, citing KD Lindsted S Tonstad and JW Kuzma 'Self-report of physical activity and patterns of mortality in Seventh-day Adventist men' (1991) 44 *Journal of Clinical Epidemiology* at pp 355–364.

a 23 percent lower death rate than those who remained sedentary.<sup>312</sup> Seven major cohort studies together indicate that low levels of physical activity or cardiorespiratory fitness increase risk of cardiovascular disease mortality.<sup>313</sup>

The strongest evidence of the benefits of physical activity is the reduced risk of mortality and morbidity from cardiovascular disease (CVD) in those people who participate in physical activity. Compared with those that are at least moderately physically active, people who are sedentary have a one-and-a-half to twofold increase in the risk of a fatal or non-fatal cardiovascular event such as coronary heart disease or acute myocardial infarction. These associations are strong and are independent of the definition of physical activity or cardiorespiratory fitness used.<sup>314</sup> If a natural right is connected with the preservation of the physical condition, as both Hobbes and Grotius suggest it is, then there is no clearer evidence of a natural right than a right to physical activity or a right to recreation.

Studies have found that even a single episode of physical activity can result in an improved blood lipid profile that persists for several days.<sup>315</sup> Regular participation in physical activity as well as a single exercise session can positively alter cholesterol metabolism.<sup>316</sup> An episode of physical activity has the immediate and temporary effect of lowering blood pressure

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<sup>312</sup> *US Surgeon General's Report 1996* (ibid) at p 86, citing Paffenbarger and others 'The association of changes in physical activity level and other lifestyle characteristics with mortality among men' (1993) 328 *New England Journal of Medicine* at pp 538–545.

<sup>313</sup> *US Surgeon General's Report 1996* (ibid) at p 87, citing WB Kannel and P Sorlie 'Some health benefits of physical activity: the Framingham study' (1979) 139 *Archives of Internal Medicine* at pp 857–861; RS Paffenbarger and others 'A natural history of athleticism and cardiovascular health' (1984) 252 *Journal of the American Medical Association* at pp 491–495; WB Kannel and others 'Physical activity and physical demand on the job and risk of cardiovascular disease and death: the Framingham study' (1986) 112 *American Heart Journal* at pp 820–825; KD Lindsted S Tonstad and JW Kuzma 'Self-report of physical activity and patterns of mortality in Seventh-day Adventist men' (1991) 44 *Journal of Clinical Epidemiology* at pp 355–364; GA Arraiz DT Wigle and Y Mao 'Risk assessment of physical activity and physical fitness in the Canada Health Survey Mortality Follow-up Study' (1992) 45 *Journal of Clinical Epidemiology* at pp 419–428; AZ LaCroix and others 'Does walking decrease the risk of cardiovascular disease hospitalizations and death in older adults?' (1996) 44 *Journal of the American Geriatrics Society* at pp 113–120.

<sup>314</sup> *Australian Institute of Health and Welfare Report 2000* (n 306) at p 4, citing JA Berlin and GA Colditz 'The meta-analysis of physical activity in the prevention of coronary heart disease' (1990) 132(4) *American Journal of Epidemiology* at pp 612–627; A Bauman and N Owen 'Physical activity of adult Australians: epidemiological evidence and potential strategies for health gain' (1999) 2(1) *Journal of Science, Medicine and Sport* at pp 30–41.

<sup>315</sup> *US Surgeon General's Report 1996* (n 305) at p 111, citing AD Tsopanakis and others 'Lipids and lipoprotein profiles in a 4-hour endurance test on a recumbent cycloergometer' (1989) 49 *American Journal of Clinical Nutrition* at pp 980–984; and JL Durstine and WL Haskell 'Effects of exercise training on plasma lipids and lipoproteins' (1994) 22 *Exercise and Sport Sciences Reviews* at pp 477–521.

<sup>316</sup> *ibid.*

through dilating the peripheral blood vessels, and exercise training has the ongoing effect of lowering blood pressure by attenuating sympathetic nervous system activity.<sup>317</sup>

Evidence from epidemiologic studies shows that a physically active lifestyle reduces the risk of sudden cardiac death. And a meta-analysis of studies that examined use of physical activity for cardiac rehabilitation showed that endurance exercise training reduced the overall risk of sudden cardiac death even among persons with advanced coronary atherosclerosis.<sup>318</sup>

Physical activity has also been shown to have a role to play in the prevention, maintenance, and treatment of obesity, although more prolonged activity is required for weight loss.<sup>319</sup>

Research shows the benefits of physical activity in the prevention and treatment of type 2 diabetes.<sup>320</sup> The epidemiologic literature strongly supports a protective effect of physical activity on the likelihood of developing type 2 diabetes.<sup>321</sup>

The *US Surgeon General's Report 1996* reports on the relative consistency of findings in epidemiologic studies indicating that physical activity is associated with a reduced risk of

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<sup>317</sup> *US Surgeon General's Report 1996* (n 305) at p 111, citing AS Leon 'Effects of exercise conditioning on physiologic precursors of coronary heart disease' (1991) 11 *Journal of Cardiopulmonary Rehabilitation* at pp 46–57; American College of Sports Medicine 'Position stand: physical activity, physical fitness, and hypertension' (1993) 25 *Medicine and Science in Sports and Exercise* at pp i–x; and R Fagard and others 'Physical exercise in hypertension' in JH Laragh and BM Brenner (ed) *Hypertension: pathophysiology, diagnosis, and management* (Raven Press New York 1990) vol 2, at pp 1985–1998.

<sup>318</sup> *US Surgeon General's Report 1996* (n 305) at p112, citing AS Leon and others 'Leisuretime physical activity levels and risk of coronary heart disease and death: the Multiple Risk Factor Intervention Trial' (1987) 258 *Journal of the American Medical Association* at pp 2388–2395; and GT O'Connor and others 'An overview of randomized trials of rehabilitation with exercise after myocardial infarction' (1989) 80 *Circulation* at pp 234–244.

<sup>319</sup> *Australian Institute of Health and Welfare Report 2000* (n 306) at p 5, citing SM Grundy and others 'Assessment of cardiovascular risk by use of multiple-risk-factor assessment equations: a statement for health-care professionals from the American Heart Association and the American College of Cardiology' (1999) 100 *Circulation* at pp 1481–1492. See also *US Surgeon General's Report 1996* (n 305) at pp 133–135.

<sup>320</sup> *Australian Institute of Health and Welfare Report 2000* (n 306) at p 6, citing J Ivy and others 'Prevention and treatment of non-insulin-dependent diabetes mellitus' in J Holloszy (ed) *Exercise and sport sciences reviews* (Lippincott Williams and Wilkins Philadelphia 1999) vol 17 at pp 1–36; J Manson and A Spelsberg 'Primary prevention of non-insulin-dependent diabetes mellitus' (1994) 10(3) *American Journal of Preventive Medicine* at pp 172–184; FB Hu and others 'Walking compared with vigorous physical activity and risk of type 2 diabetes in women' (1999) 282(15) *The Journal of the American Medical Association* at pp 1433–1439. See also *US Surgeon General's Report 1996* (n 305) at pp 125–129.

<sup>321</sup> *US Surgeon General's Report 1996* (n 305) at p 128, citing H King and AM Kriska 'Prevention of type II diabetes by physical training: epidemiology considerations and study methods' (1992) 15 *Diabetes Care* at pp 1794–1799; AM Kriska and PH Bennett 'An epidemiological perspective of the relationship between physical activity and NIDDM: from activity assessment to intervention' (1992) 8 *Diabetes/Metabolism Reviews* at pp 355–372; and others.



colon cancer. Eleven studies assessed the association between leisure-time or total physical activity and colon cancer risk in 13 different study populations.<sup>322</sup> Numerous studies show the protective effect of physical activity on risk of colon cancer, and on the prevention of precancerous polyps in the large bowel. Studies of physical activity report a reduction in the risk of breast cancer among physically active women.<sup>323</sup>

Physical activity also has great influence on and benefits for mental health. The *US Surgeon General's Report 1996* also highlights that epidemiologic research among men and women suggests that physical activity may be associated with reduced symptoms of depression, clinical depression, symptoms of anxiety, and improvements in positive affect and general well-being. In general, persons who are inactive are twice as likely to have symptoms of depression than are more active persons.<sup>324</sup> Studies consistently show that participation in physical activity reduces symptoms of stress, anxiety and depression.<sup>325</sup> In one study in 1999, the conclusions demonstrated that exercise aided the depressed both on short-term and long-term scales. The experiment was such that 111 healthy adults, none suffering from clinical depression, were randomly assigned to two groups. One group was to use bicycle ergometers twenty-four minutes a session, four times a week for twelve weeks. The other group was to do the same exercise but forty-eight minutes a session, four times a week for twelve weeks. And to make the experiment complete, there was a group assigned to a “waiting list” to serve as the experiment’s control. By the end of the twelve weeks, the

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<sup>322</sup> *US Surgeon General's Report 1996* (n 305) at pp 112-124; and at Table 4-5, pp 114-115.

<sup>323</sup> *Australian Institute of Health and Welfare Report 2000* (n 306) at p 7, citing G Colditz and others ‘Physical activity and reduced risk of colon cancer: implications for prevention’ (1997) 8 *Cancer Causes and Control* at pp 649–667; A Neugut and others ‘Leisure and occupational physical activity and risk of colorectal adenomatous polyps’ (1996) 68 *International Journal of Cancer* at pp 744–748; M Slattery and others ‘Energy balance and colon cancer—beyond physical activity’ (1997) 57 *Cancer Research* at pp 75–80; MD Gammon EM John and JA Britton ‘Recreational and occupational physical activities and risk of breast cancer’ (1998) 90(2) *Journal of the National Cancer Institute* at pp 100–117; P Latikka and others ‘Relationship between the risk of breast cancer and physical activity’ (1998) 26(3) *Sports Medicine* at pp 133–143; and J Verloop and others ‘Physical activity and breast cancer risk in women aged 20–54 years’ (2000) 92(2) *Journal of the National Cancer Institute* at pp 128–135.

<sup>324</sup> *US Surgeon General's Report 1996* (n 305) at p 136, citing CE Ross and D Hayes ‘Exercise and psychologic well-being in the community’ (1988) 127 *American Journal of Epidemiology* at pp 762–771; T Stephens ‘Physical activity and mental health in the United States and Canada: evidence from four population surveys’ (1988) 17 *Preventive Medicine* at pp 35–47; and T Stephens and CL Craig *The well-being of Canadians: highlights of the 1988 Campbell's Survey* (Canadian Fitness and Lifestyle Research Institute Ottawa 1990); amongst others.

<sup>325</sup> *Australian Institute of Health and Welfare Report 2000* (n 306) at p 9, citing D Glenister ‘Exercise and mental health: a review’ (1996) 116(1) *Journal of the Royal Society of Health* at pp 7–13; and P Hassmén and others ‘Physical exercise and psychological well-being: a population study in Finland’ (2000) 30 *Preventive Medicine* at pp 17–25; amongst others.

authors were able to conclude that not only had physiological benefits occurred, such as a stronger heart, but also psychological improvements were made, specifically with depression.<sup>326</sup>

The epidemiological research thus demonstrates the essentialness of physical activity for the human form. Physical activity, the chief component of recreation, assists in the preservation of life and of the human condition, enhancing feelings of wellbeing. Physical activity may be a natural right since, by engaging in physical activity, we seek to maximize our wellbeing and preserve our (human) nature.

## 2. The interplay between public rights and natural rights

In developing his theory of law, Montesquieu showed concern for the extent to which man's life is determined by the condition and behaviour of his body. The passions, the spirit, the character, imagination, taste, sensibility, sadness and happiness, all are said to be determined by the state of the body.<sup>327</sup> And so too, laws. Montesquieu saw the passions, spirit, and sensibilities of man in his natural condition as an intrinsic aspect of natural justice. Natural justice is recognizable in man's sociability, his kindness, his gratitude, and in feelings of equitability.<sup>328</sup> Montesquieu wrote of man as a physical being alike that of other animals on Earth; possessing of natural laws because he is united by feeling and the ability to attract pleasure to preserve their being.<sup>329</sup>

Man in his prepolitical natural existence functions intuitively, in accord with "relations of fairness prior to the positive law that establishes them."<sup>330</sup> Yet man's nature, his quest for wellbeing, also propels him toward civil society. It is through a conjunction of separate wills

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<sup>326</sup> TM DiLorenzo and others 'Long-term effects of aerobic exercise on psychological outcomes' (1999) 28(1) *Prev Med* at pp 75-85.

<sup>327</sup> Montesquieu *De l'Esprit des lois* Bk 14 chs 2, 3, 4. See TL Pangle *Montesquieu's Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at p 165.

<sup>328</sup> Montesquieu *De l'Esprit des lois* Bk 1 ch 1: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 4.

<sup>329</sup> *ibid.*

<sup>330</sup> Montesquieu *De l'Esprit des lois* Bk 1 ch 1: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 4.

that society is formed;<sup>331</sup> the desire to secure wellbeing in more palpable and enduring form being the context of that will. “[C]ivil society is man’s way of attempting to go beyond the bare self-preservation, the constant insecurity, of the natural state. Through civil society man tries to gain a *secure* self-preservation, a lasting peace and a protection for material goods that will insure lasting satisfaction of the body’s needs.”<sup>332</sup>

Law and government become of critical importance to man when he forms society with his fellow men because on forming in society man is immediately susceptible to conflict with his fellow man, each individual seeking advantage and profit to himself in conflict with his fellow citizens.<sup>333</sup> The need and use of law is to manage this conflict. Law, for Montesquieu, is not the will of a sovereign power, but rather a much more complex concept. Laws arise consequent to the relations of citizens upon forming in society. Legislative action alone did not define law in Montesquieu’s view: “Montesquieu spoke of law as a relation precisely because, unlike Hobbes and Pufendorf, he did not regard it as the command of a superior or the will of the sovereign.”<sup>334</sup> Laws are relations in themselves; they are a connection between the citizens, a connection between the citizen and his government, a connection between the citizen in society and his natural state prior to society, a connection between man and his sentiments, a connection between man and his manners, morals and mores.

Montesquieu sees positive law as a complex structure which respects the underlying order of nature, other positive laws, the nature of government, the nature of man, natural rights, man’s passions and inclinations, his commerce, customs and manners: Book 1, chapter 3.<sup>335</sup> Laws “have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they

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<sup>331</sup> Montesquieu *De l’Esprit des lois* Bk 1 ch 3: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 8.

<sup>332</sup> TL Pangle *Montesquieu’s Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at p 34.

<sup>333</sup> Montesquieu *De l’Esprit des lois* Bk 1 ch 3: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at pp 7-8; and Bk 19 ch 27; J Brethe de la Gressaye (ed) *Montesquieu: De l’Esprit des lois* (Société Les Belles Lettres Paris 1950) at pp 25-26; G Truc *Montesquieu: De L’Esprit des Lois* (Garnier Frères Paris 1949) vol 1, at pp 9-11. See also TL Pangle *Montesquieu’s Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at pp 32-33 citing R Caillois (ed) *Oeuvres complètes de Montesquieu* (Bibliothèque de la Pléiade edn Gallimard Paris 1949-51) vol 1, at p 236.

<sup>334</sup> JN Shklar *Montesquieu* (Oxford University Press Oxford 1987) at p 71.

<sup>335</sup> Montesquieu *De l’Esprit des lois* Bk 1 ch 3: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at pp 7-8.

ought to be considered.”<sup>336</sup> In book 26 of *The Spirit of the Laws* Montesquieu lists nine “sorts” of law, from natural right and divine right down to civil and domestic right, and shows how laws should relate to the entire “order of things upon which they are to interact.”

Montesquieu also sees a dualism in the natural human condition – man both as a ‘physical being’ and as ‘intelligent being’ (Book 1, chapter 1) – which dualism contributes to, subsists in conjunction with, and is enhanced by, society. This dualism also instinctively prompts the promulgation of law that reflects the laws of nature back to man. As a physical being, man is like other bodies – wholly lawful (that is, of his nature and in a state of nature possessing natural rights). As intelligent being, however, man is free to violate his natural laws interminably. Montesquieu sees ‘intelligent beings’ as sabotaging the law of nature: “...[T]hough the intelligent world also has laws that are invariable by their nature, unlike the physical world, it does not follow its laws consistently. The reason for this is that particular intelligent beings are limited by their nature and are consequently subject to error; furthermore, it is in their nature to act by themselves. Therefore, they do not consistently follow their primitive laws or even follow the laws they give themselves.”<sup>337</sup> The primary purpose of positive law in society, therefore, is to ground and enforce between the citizens those essential laws of nature; being peace, nourishment and sociability, particularly:

“Man, as a physical being, is governed by invariable laws like other bodies. As an intelligent being, he constantly... changes those [laws] he himself establishes; he must guide himself, and yet he is a limited being; he is subject to ignorance and error, as are all finite intelligences... As a feeling creature, he falls subject to a thousand passions... Such a being could at any moment forget himself; philosophers have reminded him of himself by the laws of morality. Made for living in society, he could

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<sup>336</sup> Montesquieu *De l'Esprit des lois* Bk 1 ch 3: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at pp 7-8; and Bk 19, ch 27; J Brethe de la Gressaye (ed) *Montesquieu: De l'Esprit des lois* (Société Les Belles Lettres Paris 1950) at pp 25-26; G Truc *Montesquieu: De L'Esprit des Lois* (Garnier Frères Paris 1949) vol 1, at pp 9-11.

<sup>337</sup> Montesquieu *De l'Esprit des lois* Bk 1 ch 1: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 4.

forget his fellows; legislators have returned him to his duties by political and civil laws.”<sup>338</sup>

The law of nature is subsumed within positive law. Positive law *should* thus be a practical expression of the natural law. The egotistic ‘intelligent’ being, who conflicts with his fellow egotistic ‘intelligent’ humans in society, is commanded to remember his natural tranquillity and natural sociability. The general purpose of the civil law is to enforce the natural law of sociability.<sup>339</sup> “This complex view of human nature informs [Montesquieu’s] conceptions of politics and judging, since our natural passions or sentiments, which orient us toward peaceful, tranquil sociability, define us more fundamentally than our reason or any higher ambitions. We are neither as naturally sociable nor as naturally selfish as either Aristotle or Hobbes would have it, nor are we as radically historical or malleable as Rousseau later suggests. The genius of a moderate politics – of the spirit of laws properly conceived – is to grasp our nature in all its complexity and constitute laws and institutions that will preserve all its dimensions.”<sup>340</sup>

Law becomes the essential safeguard of the natural rights of man not through an overt process involving the declaration of those rights in a constitution or by juridical pronouncement, but, rather, by virtue of its natural connection with natural justice in prepolitical nature. Natural rights are absorbed by positive law. Relations of fairness exist prior to the positive law *that establishes them*. Absolutes, traceable to nature, provided the foundation for Montesquieu’s definition of justice. Take the concept of nature away from Montesquieu and his thoughts would no longer be intelligible. He teaches that the promulgation of law requires the legislator to “follow the ‘natural genius’, the passions and inclinations, of a people.”<sup>341</sup> In all times and places human law *must* obey natural law or

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<sup>338</sup> Montesquieu *De l’Esprit des lois* Bk 1 ch 1: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 5.

<sup>339</sup> MH Waddicor *Montesquieu and the Philosophy of Natural Law* (Martinus Nijhoff The Hague 1970) at p 43, citing Montesquieu *De l’Esprit des lois* Bk 1 ch 1: ‘Fait pour vivre dans la société, [l’homme] y pouvait oublier les autres; les législateurs l’ont rendu à ses devoirs par les lois politiques et civiles.’ [Made for living in society, he could forget his fellows; legislators have returned him to his duties by political and civil laws.] (R Caillois (ed) *Oeuvres complètes de Montesquieu* (Bibliothèque de la Pléiade edn Gallimard Paris 1949-51) vol 1, at p 236).

<sup>340</sup> PO Carrese *The cloaking of power: Montesquieu, Blackstone, and the rise of judicial activism* (University of Chicago Press Chicago 2003) at p 20.

<sup>341</sup> Montesquieu *De l’Esprit des lois* Bk 19 chs 16-26. See TL Pangle *Montesquieu’s Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at p 197.

contradict and eventually destroy itself.<sup>342</sup> Positive law thus has no end other than to provide structure to the laws of nature. The only way to prevent the state of conflict that accompanies the establishment of societies is to institute positive laws in conformity with natural rights. Montesquieu noted that:

“L’autorité des princes et magistrates n’est pas seulement fondée sur le droit civil, elle l’est encore sur le droit naturel: car, comme l’anarchie est contraire au droit naturel, le genre humain ne pouvant subsister par elle, il faut bien que l’autorité des magistrates, qui est opposée à l’anarchie, y soit conforme.” [The authority of princes and magistrates is not only founded on the civil law, it is it also founded on natural rights: because, as anarchy is contrary to natural rights, mankind not being able to survive from it, it is necessary that the authority of magistrates, which is opposite to anarchy, is in keeping with natural rights].<sup>343</sup>

Whereas Montesquieu viewed law, properly conceived, as instinctively encompassing natural rights, Blackstone viewed natural rights as valid even in the face of positive law: “Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture.”<sup>344</sup> For both Montesquieu and Blackstone, the idea that a norm which does not conform to the natural law cannot be legally valid is the definitive concept of their naturalism.

If we accept that the right of man to preserve his human form is a natural right, as Montesquieu, Hobbes and Cicero encourage us to so do, then this understanding can guide us in developing and applying substantive legal rights. A public right to recreation at public

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<sup>342</sup> TL Pangle *Montesquieu's Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at p 263.

<sup>343</sup> *Pensée* 883 recorded in MH Waddicor *Montesquieu and the Philosophy of Natural Law* (Martinus Nijhoff The Hague 1970) at pp 39-40, citing R Caillois (ed) *Oeuvres complètes de Montesquieu* (Bibliothèque de la Pléiade edn Gallimard Paris 1949-51) vol 1, at p 1441. The *Pensée* are personal reflections of Montesquieu included in the complete works editions of his writings and jurisprudence.

<sup>344</sup> Sir W Blackstone *Commentaries on the Laws of England* (Clarendon Press Oxford 1765-1769) vol i, s 2, at p 54.

places such as beaches, parks, commons, and even on the public highway itself (provided that such recreation comprises of physical activity consistent with the purposes of the highway and not obstructive of those purposes) finds endorsement from natural law. Public rights, as established and protected through public nuisance suits at common law, obtain validity not only by virtue of their being recorded in law reports but by virtue of their conformity to natural rights. Man's natural rights are those that support his essential nature, his physicality, his sentiments, and his sociability. Failure on the part of either the Executive or the Judiciary to confirm the validity of man's natural rights in the context of a conflict between citizens, or between the citizen and the state, is, following Montesquieu's teachings, a sabotage of society and a sabotage of the nature and purpose of man. A public right to recreation, confirmed by the Judiciary, and finding validity in conformity with a natural right to self-preservation, can come into direct conflict with the commercial motivations of a sports association conducting a publicly exhibited sporting event at a public place. The lawfulness of a publicly exhibited sporting event rests entirely on due consideration being given to public rights at public places. Given the need of man for physical activity and recreation, in order that he might better preserve his physiological and psychological health, the law properly encourages public rights through public nuisance litigation. The law reflects the scientific knowledge we now possess on the benefits of physical activity. Public rights at public places, recognised as positive law by courts, solidify the aesthetic natural rights of physical activity and recreation.

The conflict that arises between the citizen engaged in recreation and the citizen wanting to pursue a commercial activity of a publicly exhibited sporting event at a public place describes the relations between these two entities. The law, which would resolve this conflict, also describes the relations between these two entities. The law will decide between public rights on the one hand, and commercial liberty on the other. What is the law which we ought to apply to resolve this conflict? If we follow Montesquieu's teachings, the correct answer lies in the legal result that most closely endorses the laws of nature. Man's natural right to preserve his being coupled with his natural right to sociability suggest that the correct legal answer is the one which validates his substantive public rights at common law in preference to any commercial liberty which would diminish those public rights.

From early in the development of the common law it was reasoned that games and sports were not *malum in se* but rather *malum prohibita*.<sup>345</sup> What this means is that sports are lawful unless and until they impinge upon proscriptions at common law or under legislation.<sup>346</sup> The individual liberty to engage in physical activity is thus universal and natural until there is conflict between fellow citizens. A conflict between citizens can arise when one citizen endeavours to obtain advantage and profit to himself by promoting or participating in a commercialized sporting endeavour to the detriment of another citizen who is peaceably exercising a natural right to recreation. The corollary of the notion that sport is a natural right of human beings, which liberty is enforceable as a public right, and which is susceptible to impingement by commercial interests, is that public exhibitions of sporting events, played in such fashion as to create or threaten a public nuisance by impinging on the public's natural and public rights, is a *special* category of human activity that depends for legitimacy on sanction from Parliament in order to forestall interdiction at common law. Publicly exhibited sporting events, staged for pecuniary purposes, are not supported by natural law because they are a commercial construct arising consequent to the formation of society whereby individuals seek advantage and profit in conflict with their fellow citizens. Such events are not *natural* in the manner of being essential to the conservation of the human condition.

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<sup>345</sup> *Bell v The Bishop of Norwich* (1566) 3 Dyer 254b.

<sup>346</sup> See *Bell v The Bishop of Norwich* (1566) 3 Dyer 254b; *Case of Monopolies* (1602) 11 Co Rep 84b; *Sherbon v Colebach* (1690) 2 Vent 175 (CB); *Goodburn v Marley* (1742) 2 Str 1159 (BR); *Holmes v Bagge and Fletcher* (1853) 1 El & Bl 782; *R v Young* (1866) 10 Cox CC 371; *Swigart v People of the State of Illinois* 50 Ill App 181 (1892), 154 Ill 284, 40 NE 432 (1895); *Pallante v Stadiums Pty Ltd (No. 1)* [1976] VR 331; *Attorney General's Reference (No. 6 of 1980)* [1981] 2 All ER 1057 (Court of Appeal); *R v Brown* [1994] 1 AC 212 (House of Lords). And see also Hawk P C, Bk 1 ch 75 s 6; W Hawkins *Pleas of the Crown* (Professional Books London 1973); and *Lambard Eirenarcha* (1581): PR Glazenbrook (ed) *Lambard's Eirenarcha The first Booke* (Professional Books Limited, Abingdon, 1980)) ch 19 at p 178.



## **Part 2    The Nature of Public Nuisance**

## Chapter 5

### The inherent features of the common law offence of public nuisance

#### 1. The distinction between the common law crime of public nuisance, the tort of public nuisance, and private nuisance

On public nuisance, Lord Justice Denning, as he then was, commented, “The term ‘public nuisance’ covers a multitude of sins, great and small.”<sup>347</sup> A public nuisance is a common law offence for which the Crown can institute criminal proceedings by way of prosecution or civil proceedings by way of relator action or *ex officio* suit to obtain an injunction to abate the public nuisance. A public nuisance may also incur tortious liability for which a plaintiff may obtain damages at common law, but only if such public nuisance causes special and peculiar damage. It is not correct to state, as some writers do,<sup>348</sup> that public nuisance is a tort, *per se*.<sup>349</sup> “A public nuisance falls within the law of torts only in so far as it may in the particular case constitute some form of tort also. Thus the obstruction of a highway is a public nuisance; but if it causes any special and peculiar damage to an individual, it is **also** a tort actionable at his suit.”<sup>350</sup> Whilst the nuisance the cause of such a private suit remains a crime, a remedy is available to an individual person, where a plaintiff can prove a further aspect to the particular circumstances of the case, namely special and peculiar damage to himself. It is only in this special circumstance where an individual person might have

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<sup>347</sup> *Southport Corporation v Esso Petroleum Co Ltd* [1954] 2 QB 182 at p 196 (Denning LJ)

<sup>348</sup> See eg the commentary of Bronitt and McSherry in S Bronitt & B McSherry *Principles of Criminal Law* (LBC Information Services Sydney 2001) at p 782.

<sup>349</sup> See RVF Heuston & RA Buckley *Salmond & Heuston on the Law of Torts* (20<sup>th</sup> edn Sweet & Maxwell London 1992) at pp 58-59. *Salmond & Heuston on the Law of Torts* specifically notes at p 58 that: “A public or common nuisance is a criminal offence.”

<sup>350</sup> *ibid* at p 59, emphasis added.

sufficient standing to institute a civil suit for damages. In all cases of the common law crime of public nuisance only the Executive has standing. In this light it is more accurate to describe public nuisance as a crime only. An appropriate phrase for the tortious action in public nuisance is the more elongated phrase *public nuisance causing special and peculiar damage to an individual*. Whilst there is a distinction between the common law criminal offence and the tortious proceeding for public nuisances, this thesis assesses the case law from both spheres, where there have been prosecutions for committing a public nuisance (*R v Shorrock* [1993] 3 WLR 698 (Court of Appeal); *R v Rimmington*, *R v Goldstein* [2005] UKHL 63, [2006] 1 AC 459, [2005] 3 WLR 982); where there have been civil proceedings by the Crown to seek to obtain an abatement of a common law public nuisance (*Attorney-General v Blackpool Corporation* (1907) 71 JP 478; *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91, 761 NY 2d 192 (2003)); where there have been relator actions by members of the public acting together to enforce their rights (*Attorney-General (ex rel Pratt) v Brisbane City Council* [1988] 1 Qd R 346); and where there have been tortious suits seeking damages for, or an injunction against, a nuisance (*Matheson v Northcote College Board of Governors* [1975] 2 NZLR 106).

A public nuisance is different from a private nuisance in that it is a nuisance which affects the people generally, as opposed to one person. A private nuisance is a matter of private law for private redress between private persons. A public nuisance is a matter of public law for redress at the suit of the Crown, on behalf of the people, to cease or prevent individuals engaging in conduct that is odious or disturbing to the people generally. In *Russell on Crime* the delimitation between public and private nuisance is worded thus:

“Nuisance (*nocumentum*), or annoyance, means anything which works hurt, inconvenience or damage. Nuisances are of two kinds: public or common nuisance, which materially affects the public, and is a substantial annoyance to all the King’s subjects; and private nuisance, which may be defined as anything which causes material discomfort and annoyance, for the ordinary purposes of life, to a man’s house or his property. Public or common nuisances, as they affect the whole

community in general, and not merely an individual, form the subject of public remedies and do not give a cause for private suit...”<sup>351</sup>

In *Brodie v Singleton Shire Council*, a case on tort law, Justice Hayne in the High Court of Australia explained that: “Despite the radical difference between criminal proceedings to punish an act or omission which was a matter of *public* concern, and civil proceedings to recover damages for *private* loss, the language of nuisance was used in both contexts. It is, nevertheless, important to recall that the crime of common or public nuisance and the tort of nuisance were and are distinct. There can be no automatic transposition of the learning in one area to the other...”<sup>352</sup> In the course of his judgement in *Copart Industries Inc v Consolidated Edison Co of New York Inc*,<sup>353</sup> in the Court of Appeals of New York, Justice Cooke, speaking for the court, sought to define the parameters of nuisance and to distinguish public nuisance from private nuisance. Quoting *Prosser on Torts*, His Honour commenced his judgement with the words: “‘There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance’. It has meant all things to all men’ (Prosser, *Torts* [4th ed], p. 571). From a point someplace within this oft-noted thicket envisioned by Professor Prosser, this appeal emerges.”<sup>354</sup> His Honour continued, at page 567:

“Much of the uncertainty and confusion surrounding the use of the term nuisance, which in itself means no more than harm, injury, inconvenience, or annoyance (see Webster’s *Third New International Dictionary*, p. 571; *American Heritage Dictionary*, p. 900), arises from a series of historical accidents covering the invasion of different kinds of

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<sup>351</sup> JW Cecil Turner (ed) *Russell on Crimes* (10<sup>th</sup> edn Stevens & Sons London 1950) vol I, at p 1669.

<sup>352</sup> [2001] HCA 29 at para [257]. Justice Hayne does not provide us with his definition of public nuisance in his judgment, unfortunately, other than to state that: “...by the late nineteenth century it was accepted that, because it was a common or public nuisance unreasonably to obstruct or hinder free passage along the highway, a private individual has a right of action in respect if that nuisance upon proof of particular damage beyond the general inconvenience and injury suffered by the public.” [at para 259].

<sup>353</sup> 41 NY 2d 564, at p 568, 394 NYS 2d 169, 362 NE 2d 968 (1977). In this case, the plaintiff operated a new car preparation business next to defendant’s plant. The plaintiff claimed that it was forced to close its business because the emissions from defendant’s plant damaged the exteriors of the cars the plaintiff had on its property. The plaintiff sought damages for loss of investment and loss of profit under three causes of action alleging nuisance, wrongful and unlawful trespass, and violations of air pollution laws. Judgment was entered in favour of defendant. An intermediate appellate court affirmed. The court of appeals affirmed the lower courts’ decisions because the jury had been properly instructed that plaintiff was required to prove that defendant’s actions were either intentional or negligent in order to recover on a claim for nuisance.

<sup>354</sup> *ibid* at p 565.

interests and referring to various kinds of conduct on the part of defendants (Prosser, *Torts* [4th ed], pp. 571-572). The word surfaced as early as the twelfth century in the assize of nuisance, which provided redress where the injury was not a disseisin but rather an indirect damage to the land or an interference with its use and enjoyment. Three centuries later the remedy was replaced by the common-law action on the case for nuisance, invoked only for damages upon the invasion of interests in the use and enjoyment of land, as well as of easements and profits. If abatement by judicial process was desired, resort to equity was required. Along with the civil remedy protecting rights in land, there developed a separate principle that an infringement of the right of the crown, or of the general public, was a crime and, in time, this class of offence was so enlarged as to include any ‘act not warranted by law, or omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty’s subjects’ (Stephen, *General View of Criminal Law of England* [1890], p. 105)...

As observed by Professor Prosser, public and private nuisances ‘have almost nothing in common, except that each causes inconvenience to someone, and it would have been fortunate if they had been called from the beginning by different names’ (Prosser, *Torts* [4th ed], p 573).’’

Early in common law history, Bracton describes a public nuisance as, “*nocumentum iniuriosum propter communem et publicam utilitatem*”; a legal nuisance by reason of the common and public welfare. According to Bracton, public nuisances can be removed for the benefit of the general public albeit no adjoining occupier is personally adversely affected.<sup>355</sup> In Hawkins it is written that: “a Common Nuisance may be defined to be an Offence against the Publick, either by doing a Thing which tends to the Annoyance of all the King’s Subjects, or by

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<sup>355</sup> Bracton: *De Legibus et Consuetudinibus Angliae* f 232b: SE Thorne (tr) and GE Woodbine (ed) *The Laws and customs of England vols 3 and 4* (Belknap Press Cambridge 1977) vol 3, at p 90. See JR Spencer ‘Public Nuisance – A Critical Examination’ (1989) CLJ 55 at p 58.

neglecting to do a Thing which the common Good requires.”<sup>356</sup> Hawkins also lays it down that acting against the Crown’s interests may be a public nuisance: “Also it is said, That the Law hath so tender a Regard for the Interests of the King and of Religion, That an Indictment for doing a Thing which plainly appears immediately to tend to the Prejudice of either of them, is good, though it do not expressly complain of it as a common Grievance.”<sup>357</sup> Every public nuisance is a *malum in se*.<sup>358</sup>

Hawkins was cited in the leading United Kingdom case on public nuisance: *R v Rimmington, R v Goldstein*.<sup>359</sup> Lord Bingham of Cornhill, giving the principal judgment of the United Kingdom House of Lords, noted the following distinguishing features of the tort and crime of public nuisance:

“By the 15th century an action on the case for private nuisance was recognized. Thus the action for private nuisance was developed to protect the right of an occupier of land to enjoy it without substantial and unreasonable interference. This has remained the cardinal feature of the tort, as recently affirmed by the House in *Hunter v Canary Wharf Ltd* [1977] AC 655. The interference complained of may take any one of many different forms. What gives the tort its unifying feature (see Fleming, *The Law of Torts*, 9th ed, (1998), p 457) is the general type of harm caused, interference with the beneficial occupation and enjoyment of land, not the particular conduct causing it.

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<sup>356</sup> 1 Hawk PC ch 75, s 1: W Hawkins *Pleas of the Crown* (Professional Books London 1973). A ‘common nuisance’ is interchangeable with ‘public nuisance’; case law and commentary on the common law use the words common and public interchangeably when describing a public nuisance. The term ‘common nuisance’ has given way to the term ‘public nuisance’ owing to the etymological fact that the word common has changed in meaning to connote ‘ordinary’ rather than ‘of the community’. See further the discussion in JR Spencer ‘Public Nuisance – A Critical Examination’ (1989) CLJ 55 at p 58 fn 10. Spencer criticises Hawkins’ description thus: “This definition is so wide that it can scarcely be called a definition at all, and it is amazing that anyone should assume that Hawkins was describing a single offence, rather than making a residual category of offences which did not fit anywhere else in his scheme...Nevertheless, Hawkins’ words have been so interpreted, and his ‘definition’ is the basis of the definition for a single offence of public nuisance which appears in almost every book on tort or criminal law today.”: (1989) CLJ 55 at p 66.

<sup>357</sup> 1 Hawk PC ch 75, s 4.

<sup>358</sup> 1 Hawk PC ch 75, s 8.

<sup>359</sup> [2005] UKHL 63 at para [8], [2006] 1 AC 459, [2005] 3 WLR 982.

It became clear over time that there were some acts and omissions which were socially objectionable but could not found an action in private nuisance because the injury was suffered by the local community as a whole rather than by individual victims and because members of the public suffered injury to their rights as such rather than as private owners or occupiers of land. Interference with the use of a public highway or a public navigable river provides the best and most typical example. Conduct of this kind came to be treated as criminal and punishable as such. In an unpoliced and unregulated society, in which local government was rudimentary or non-existent, common nuisance, as the offence was known, came to be (in the words of J R Spencer, 'Public Nuisance - A Critical Examination' [1989] CLJ 55, 59) 'a rag-bag of odds and ends which we should nowadays call "public welfare offences"'. But central to the content of the crime was the suffering of common injury by members of the public by interference with rights enjoyed by them as such."<sup>360</sup>

Blackstone was also cited with approval by the House of Lords in *Rimmington*; the House noting that: "In his *Commentaries on the Laws of England* (Book III, 1768, Chapter 13, p 216) Blackstone distinguished between public or common nuisances, 'which affect the public, and are an annoyance to *all* the king's subjects' and private nuisances, which he defined as 'any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another'. In Book IV (1769, Chapter 13, p 167) he explained further:

'... common nuisances are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow subjects.'

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<sup>360</sup> [2005] UKHL 63 at paras [5]-[6], [2006] 1 AC 459, [2005] 3 WLR 982 (Lord Bingham of Cornhill).

The key determinant factor then, between the common law offence of public nuisance and the torts of private nuisance and public nuisance causing special and peculiar damage to an individual, is the requirement of common injury in the former cause.<sup>361</sup>

## 2. The definition of public nuisance

“Common law has long recognised the crime of causing a public nuisance.”<sup>362</sup> Public nuisance is a broad offence which criminalizes conduct that poses danger to the community at large. The judicially accepted definition is that provided in *Archbold*.<sup>363</sup> The current definition of the offence in *Archbold’s Criminal Pleading, Evidence and Practice* reads:

“Public nuisance is an offence at common law. A person is guilty of a public nuisance (also known as a common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty’s subjects...”<sup>364</sup>

The *Archbold* definition is taken from *Stephen’s Digest of the Criminal Law* which defined the offence in the following terms:

“A common nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty’s subjects.”<sup>365</sup>

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<sup>361</sup> *ibid* at para [12].

<sup>362</sup> *R v Goldstein, R v R* [2003] EWCA Crim 3450 at para [3], [2004] 1 WLR 2878 at p 2880 (Latham LJ).

<sup>363</sup> Applied in *R v Rimmington, R v Goldstein* [2005] UKHL 63 at para [36], [2006] 1 AC 459, [2005] 3 WLR 982 (House of Lords); *R v Goldstein, R v R* [2003] EWCA Crim 3450 at para [3], [2004] 1 WLR 2878 at p 2880 (Court of Appeal); *R v Shorrock* [1994] QB 279, [1993] 3 WLR 698 (Court of Appeal). In *R v Goldstein, R v R*, Lord Justice Latham used the express words that the *Archbold* definition was the accepted definition: *ibid*.

<sup>364</sup> JF Archbold *Archbold’s Criminal Pleading and Practice* (44<sup>th</sup> edn Sweet and Maxwell London 1992) vol 2, p 3374, paras [31]-[40]; (Sweet & Maxwell London 2003) at p 2550, paras [31]-[40].

<sup>365</sup> (8<sup>th</sup> edn Sweet & Maxwell London 1947) at p 184; (9<sup>th</sup> edn Sweet & Maxwell 1950) at p 179.



This latter definition is the one adopted in *Smith and Hogan Criminal Law*.<sup>366</sup> And Stephen's definition was relied upon by the Court of Appeal for England and Wales in *Attorney General v PYA Quarries Ltd*,<sup>367</sup> which was a relator action for an injunction to restrain a public nuisance caused by dust and vibration in a quarry. In *Attorney General v PYA Quarries Ltd*, Lord Justice Romer noted that a public nuisance is one which materially affects the reasonable comfort and convenience of life of a class of the public. "It is not necessary to prove that every member of the class has been injuriously affected;..." he states, "it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue."<sup>368</sup>

The United Kingdom House of Lords has recently approved of the definition in *Stephen and Archbold* in their decision in *R v Rimmington, R v Goldstein*,<sup>369</sup> with two significant qualifications. The appeals in *Rimmington* raised important and difficult questions concerning the definition and ingredients, today, of the common law crime of causing a public nuisance. The appellants contended that, as applied in their cases, the offence is too imprecisely defined, and the courts' interpretation of it too uncertain and unpredictable, to satisfy the requirements either of the common law or of the European Convention on Human Rights.<sup>370</sup> The appeals were against convictions for public nuisance offences; in the case of *Rimmington*, for mailing obscene letters and packages to hundreds of people;<sup>371</sup> and in the

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<sup>366</sup> Sir John Smith (ed) *Smith & Hogan Criminal Law* (10<sup>th</sup> edn Butterworths London 2002) at p 772; (8<sup>th</sup> edn Butterworths London 1996) at p 772.

<sup>367</sup> [1957] 2 QB 169 at p 181, [1957] 1 All ER 894 at p 899.

<sup>368</sup> [1957] 2 QB 169 at p 184. Lord Justice Romer's observations were applied in *Victoria v Second Comet Pty Ltd* (Supreme Court of Victoria, 21 December 1994) BC9405877 at [24]. See also *Wallace v Powell* [2000] NSWSC 406, where Chief Justice Hodgson utilised the following definition of public nuisance, without citing authority, "A public nuisance is an act or omission which materially affects the reasonable comfort and convenience of the life of a class of the public."

<sup>369</sup> [2005] UKHL 63, [2006] 1 AC 459, [2005] 3 WLR 982.

<sup>370</sup> *ibid* at para [1].

<sup>371</sup> Mr Rimmington sent 538 packages to the identified recipients, some of them prominent public figures. The communications were strongly racist in content, crude, coarse, insulting and in some instances threatening and arguably obscene. When arrested in June 2001 Mr Rimmington suggested that his campaign had been prompted by a racially-motivated assault upon him by a black male in 1992: he had decided to retaliate by causing 'them' mental anguish. The indictment preferred against him was challenged at the Central Criminal Court before Leveson J, who held a preparatory hearing under section 29 of the Criminal Procedure and Investigations Act 1996 to resolve the issues of law raised by the defence. He ruled that the indictment charged Mr Rimmington with an offence known to the law and that the prosecution was not an abuse of process because brought inconsistently with articles 7, 8 or 10 of the European Convention. Mr Rimmington's appeal to the Court of Appeal (Criminal Division) against that decision was heard by Latham LJ, Moses J and Sir Edwin Jowitt with that of Mr Goldstein, and was dismissed: [2003] EWCA Crim 3450, [2004] 1 WLR 2878. Lord Bingham of Cornhill sets out the facts of the cases on appeal at, *ibid*, paras [2]-[4] of the record.

case of Goldstein, for sending a letter containing salt which spilt in the postal service sorting office resulting in the evacuation of 110 postal employees owing to a fear that the substance spilt was the deadly anthrax chemical.<sup>372</sup> Both convictions were quashed; Rimmington's on the ground that the facts did not disclose an offence of public nuisance because he did not cause common injury to a section of the public and so lacked the essential ingredient of common nuisance; Goldstein's on the ground that he lacked the requisite *mens rea* to commit an offence of public nuisance because it could not be proved against Mr Goldstein that he knew or reasonably should have known (because the means of knowledge were available to him) that the salt would escape in the sorting office or in the course of post.

The two qualifications imposed by the House of Lords were, first, that endangerment to morals was not part of the definition of public nuisance, and, secondly, that public nuisance could not be extended to apply to factual circumstances where there were individually harmed victims of a perpetrator's actions, even though there may be hundreds of victims of a perpetrator's actions. The House of Lords endeavoured to refine and clarify the common law offence of public nuisance, conscious of the fact that the offence had become mired in cases to which it had no application and conscious of the fact that the offence of public nuisance lacked the clarity and precision which the law requires.<sup>373</sup>

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<sup>372</sup> Mr Goldstein, an ultra-orthodox Jew, is a supplier of kosher foods in Manchester. He bought supplies from the company of an old friend in London, Mr Abraham Ehrlich, with whom he had a bantering relationship. Mr Goldstein owed Mr Ehrlich a significant sum of money, which the latter had pressed him to pay. Mr Goldstein accordingly put the cheque in an envelope (addressed to Ibrahim Ehrlich) and included in the envelope a small quantity of salt. This was done in recognition of the age of the debt, salt being commonly used to preserve kosher food, and by way of reference to the very serious anthrax scare in New York following the events of 11 September 2001, which both men had discussed on the telephone shortly before. The inclusion of the salt was intended to be humorous, and Mr Ehrlich gave unchallenged evidence at trial that had he received the envelope he would have recognised it as a joke. But the envelope did not reach him. In the course of sorting at the Wembley Sorting Office some of the salt leaked onto the hands of a postal worker who understandably feared it might be anthrax and raised the alarm. The building, in which some 110 people worked, was evacuated for about an hour, the second delivery for that day was cancelled and the police were called. On inspecting the envelope the police were satisfied that the substance was salt. Mr Goldstein pleaded not guilty before a judge (His Honour Judge Fingret) and jury in the Crown Court at Southwark but on 3 October 2002 he was convicted. He was sentenced to a Community Punishment Order of 140 hours, and ordered to pay £500 compensation and £1850 towards the costs of the prosecution. His appeal against conviction was heard and dismissed with that of Mr Rimmington. Lord Bingham of Cornhill sets out the facts of the cases on appeal at, *ibid*, paras [2]-[4] of the record.

<sup>373</sup> *R v Rimmington, R v Goldstein* [2005] UKHL 63 at para [37] (Lord Bingham of Cornhill), [2006] 1 AC 459, [2005] 3 WLR 982 (House of Lords).

### a. Public nuisance and public morals

In reference to morals, The House of Lords declared that the definition of public nuisance was that definition that had been consistently applied in the case law, defined in Commonwealth Codes, and defined in as *Archbold* and *Stephen*, save for the reference to morals in the last two instances.<sup>374</sup> The House appears to suggest that the case law wherein public nuisances are adjudged do not reference endangerment to public morals as an ingredient of the common law offence of public nuisance, though the House does not expressly so state. The Criminal Code provisions cited in the judgment – the Criminal Code of Canada and the Criminal Code of Queensland – wherein the offence of public nuisance is codified does not reference endangerment to morals.<sup>375</sup>

However, there are cogent arguments against their Lordships decision to exclude endangerment to public morals as a ground for upholding a public nuisance offence. First, the dicta of their Lordships may be considered as obiter because the facts of the appeals did not concern acts of omissions endangering public morals. Further, there are United Kingdom precedents not cited by the House of Lords in *Rimmington* where public nuisances have been upheld on the basis of harm to public morals.<sup>376</sup> These precedents were not specifically overruled by their Lordships judgment. Thirdly, the definition in *Rimmington* is not preferred by the Supreme Court of Illinois,<sup>377</sup> nor by the Supreme Court of New York,<sup>378</sup> which both include reference to endangerment to morals as an element of the definition of public nuisance. Forth, codified definitions of public nuisance in states like Florida and

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<sup>374</sup> *R v Rimmington*, *R v Goldstein* [2005] UKHL 63 at paras [10], [36] and [45], [2006] 1 AC 459, [2005] 3 WLR 982 (House of Lords).

<sup>375</sup> See nn 284 and 285, below, and accompanying text.

<sup>376</sup> See *R v Howell* (1675) 3 Keble 465, 84 ER 826; *R v Medlor* (1679) 2 Show KB 36; and *Squires v Whisken* (1811) 3 Camp 140, where the King's Bench adjudged exhibitions of cock-fighting public nuisances.

<sup>377</sup> *City of Chicago v Beretta USA Corp* 213 Ill 2d 351, 821 NE 2d 1099 (2004).

<sup>378</sup> *Copart Industries Inc v Consolidated Edison Co of New York Inc* 41 NY 2d 564 at p 568, 394 NYS 2d 169, 362 NE 2d 968 (1977) (Cooke J citing *New York Trap Rock Corp v Town of Clarkston* 299 NY 77 at p 80 (1948); *Melker v City of New York* 190 NY 481 at p 488 (1908); Restatement, Torts, nn preceding s 822, p 217). The definition proffered in *Copart Industries Inc v Consolidated Edison Co of New York Inc* was applied in *Hoover v Durkee* 212 AD 2d 839, 622 NYS 2d 348 (1995) at p 840 of the former report; *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91, 761 NYS 2d 192 (2003); and *Wheeler v Lebanon Valley Racing Corp* 303 AD 2d 791, 755 NYS 2d 763 (2003) at p 792 of the former report; and *City of New York v Beretta USA Corp*, 315 F Supp 2d 256 (2004) at p 276.

California, for example, include harm to public morals as an element of public nuisance.<sup>379</sup> Their Lordships preference for the criminal codes of Canada and Queensland and not for those of Florida and California in supporting their view that the definition of public nuisance ought not include acts or omissions harming public morals is unconvincing.

The dicta of their Lordships in *Rimmington*, whereby they exclude from their definition of public nuisance reference to public morals, may also fail to take account of the ways in which acts can very seriously harm the peaceableness of a peoples. The guidance of the Supreme Courts of Illinois and New York may be preferred. In *Wood on Nuisances*, the author states, further to the accepted definition of public nuisance: ‘A public exhibition of any kind that tends to the corruption of morals, or to a disturbance of the peace or of the general good order or welfare of society, is a public nuisance.’<sup>380</sup>

Yet there are weighty practical matters which may make it difficult, if not impossible, for a court to assess what the public’s morals are at any given time which might be capable of being endangered. A standard applying to a determination as to whether a publicly exhibited sport offends public morals might be that standard expressed by Bruce-Knight VC in *Walter v Selfe*: It is the public morals in accord with the plain and sober and simple notions of the

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<sup>379</sup> Fla Stat § 823.01 provides:

“Nuisances; penalty — All nuisances that tend to annoy the community, injure the health of the citizens in general, or corrupt the public morals are misdemeanors of the second degree, punishable as provided in s. 775.083, except that a violation of s. 823.10 [Place where controlled substances are illegally kept, sold, or used declared a public nuisance] is a felony of the third degree.” And

Fla Stat § 823.05 provides:

“Places declared a nuisance; may be abated and enjoined -- Whoever shall erect, establish, continue, or maintain, own or lease any building, booth, tent or place which tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people as described in s. 823.01,... shall be deemed guilty of maintaining a nuisance, and the building, erection, place, tent or booth and the furniture, fixtures and contents are declared a nuisance. All such places or persons shall be abated or enjoined as provided in ss. 60.05 and 60.06.”

California uses the word ‘indecent’ in referencing morals: Cal Pen Code § 370 provides:

“Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance.”

<sup>380</sup> HG Wood *A Practical Treatise on the law of Nuisances in their various forms, including Remedies therefor at law and in equity* (3<sup>rd</sup> edn Bancroft-Whitney San Francisco 1893) at s 68; applied in *Commonwealth v McGovern* 116 Ky 212, 75 SW 261 (1903) at p 235.

people.<sup>381</sup> However, the character of the locality where the sporting event takes place, or is proposed to take place, is also important in determining the standard of comfort claimed: “The law makes it clear that the character of the locality in question is of importance in determining the standard of comfort which may reasonably be claimed by an occupier of land. ‘What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey’: *Sturges v Bridgman* (1879) 11 Ch 852 at p 865.”<sup>382</sup> Such a divergent moral standard may have a cumbersome application, which in effect makes lawful a singular sporting activity in one location unlawful if played in another location, on moral grounds. Few publicly exhibited sporting activities may be said to corrupt morals; though sports which may create public nuisances because they offend public morals could include such like dwarf-throwing, or the tossing of phocomelus persons, cock-fighting, bullfighting, boxing, and other violent sports. Pseudo-combat pastimes such as paintball shooting ranges may likewise be considered to create a public nuisance by offending public morals. But such activities may not be inimical to all persons, or even to a person of plain and sober and simple notions.

By their judgment, the House of Lords effectively forestall such impracticable considerations from public nuisance cases in their attempt to refine and clarify the offence for use in future cases, though their opinion might have been more thoroughly expounded if they had considered those precedents such as *R v Howell*,<sup>383</sup> *R v Medlor*,<sup>384</sup> and *Squires v Whisken*,<sup>385</sup> wherein endangerment to public morals was regarded as one of the constituent elements of the offence of public nuisance.

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<sup>381</sup> (1851) 4 De G and Sm 315 at p 322, 64 ER 849 at p 852 (Knight-Bruce VC). Vice Chancellor Bruce-Knight’s dictum in *Walter v Selfe* was referred to with approval in *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR 482 at p 486 (Jordan CJ), and followed in *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, 136 ACWS (3d) 776 at para [41]. See also *Attorney-General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (BCSC) at p 52 (Brown J), referring to *Goltan v De Held* 21 LJ Ch 167.

<sup>382</sup> *Walker v Pioneer Construction Co Ltd* (1967) 56 DLR (3d) 677 at p 680 (Morden J), followed in *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, [2005] 136 ACWS (3d) 776 at para [38].

<sup>383</sup> (1675) 3 Keble 465, 84 ER 826.

<sup>384</sup> (1679) 2 Show KB 36.

<sup>385</sup> (1811) 3 Camp 140.

## b. The requirement of common injury in a public nuisance offence

The second significant qualification the House of Lords made in their endeavour to clarify and make precise the definition of public nuisance was to draw a clear distinction between offences which affect the public generally – where injury is suffered by the community or a significant section of it as a whole – which are classifiable as public nuisances; and offences which affect separate individuals. A line of authority upholding prosecutions of accused persons for making numerous obscene or noisome telephone calls – the *telephone call cases* – was disapproved.

In approving the definition of public nuisance in *Archbold*, Lord Bingham of Cornhill stated at paragraph [36]:

“I would for my part accept that the offence as defined by Stephen, as defined in *Archbold* (save for the reference to morals), as enacted in the Commonwealth codes quoted above and as applied in the cases (other than *R v Soul* 70 Cr App R 295) referred to in paras 13 to 22 above [eg *R v Moore* (1832) 3 B & Ad 184; *R v Medley* (1834) 6 C & P 292; *R v Stephens* (1866) LR 1 QB 702; *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169; *R v Ruffell* (1991) 13 Cr App R (S) 204; *R v Shorrock* [1994] QB 279; and *R v Ong* [2001] 1 Cr App R(S) 404] is clear, precise, adequately defined and based on a discernible rational principle. A legal adviser asked to give his opinion in advance would ascertain whether the act or omission contemplated was likely to inflict significant injury on a substantial section of the public exercising their ordinary rights as such: if so, an obvious risk of causing a public nuisance would be apparent; if not, not.”<sup>386</sup>

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<sup>386</sup> Lord Roger of Earlsferry concurred with Lord Bingham of Cornhill’s definition of public nuisance stating at para [46]: “For present purposes I would be content to adopt the definition in *Archbold, Criminal Pleading, Evidence and Practice 2005*, para 31-40, under deletion of the reference to morals.”

The hallmark feature of the common law offence of public nuisance is that of *common injury*: “central to the content of the crime was the suffering of common injury by members of the public by interference with rights enjoyed by them as such.”<sup>387</sup> All authorities “treat the requirement of common injury as a, perhaps *the*, distinguishing feature of this offence.”<sup>388</sup> The House of Lords blatantly disapproved of a line of recent authority confirming the applicability of the common law offence of public nuisance to the *telephone call cases*. The crime of public nuisance does not extend to separate and individual telephone calls, however persistent and vexatious, and an extension of the crime to cover postal communications would be a further illegitimate extension.<sup>389</sup> Lord Bingham of Cornhill stated, at paragraph [37]:

I cannot, however, accept that *R v Norbury* [1978] Crim LR 435 and *R v Johnson (Anthony)* [1997] 1 WLR 367 were correctly decided or that the convictions discussed in paras 23 to 27 above [*R v Millward* (1986) 8 Cr App R(S) 209; *R v Eskdale* [2001] EWCA Crim 1159, [2002] 1 Cr App R(S) 118; *R v Harley* [2002] EWCA Crim 2650, [2003] 2 Cr App R(S) 16; *R v Holliday and Leboutillier* [2004] EWCA Crim 1847, [2005] 1 Cr App R(S) 349; and *R v Lowrie* [2004] EWCA Crim 2325, [2005] 1 Cr App R(S) 530] were soundly based (which is not, of course, to say that the defendants’ conduct was other than highly reprehensible or that there were not other charges to which the defendants would have had no answer). To permit a conviction of causing a public nuisance to rest on an injury caused to separate individuals rather than on an injury suffered by the community or a significant section of it as a whole was to contradict the rationale of the offence and pervert its nature, in Convention terms to change the essential constituent elements of the offence to the detriment of the accused. The offence was cut adrift from its intellectual moorings...”

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<sup>387</sup> [2005] UKHL 63 at para [6], [2006] 1 AC 459, [2005] 3 WLR 982 (Lord Bingham of Cornhill).

<sup>388</sup> *ibid* at para [12] (Lord Bingham of Cornhill).

<sup>389</sup> *ibid* at para [38] (Lord Bingham of Cornhill).

With these two modifications to the long catena of authority in public nuisance suits, the House of Lords has refined and clarified the definition of public nuisance. The decision declares that the common law offence of public nuisance is clear, precise, adequately defined and based on a discernible rational principle.<sup>390</sup>

Definitions of public nuisance in recent appellate decisions in the United States, though they have not limited the definition of public nuisance by excluding endangerment to public morals as the House of Lords has done, also confirm the salient feature of public nuisance is the requirement of common injury. Public nuisance is defined at common law in New York as “conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all ... in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.”<sup>391</sup>

### 3. Common injury and public rights in public nuisance offences

The requirement of common injury in public nuisance is intimately connected with public rights, for it is only by injury to a right common to people that a public nuisance will be found to have been committed. The definition of public nuisance requires that a public right be impinged upon – that the people be obstructed or inconvenienced in the exercise or enjoyment of their rights. In *City of Chicago v Beretta USA Corporation*,<sup>392</sup> in 2004, Justice Garman giving judgement of the Supreme Court of Illinois stated, at page 369:

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<sup>390</sup> *ibid* at para [36] (Lord Bingham of Cornhill).

<sup>391</sup> *Copart Industries Inc v Consolidated Edison Co of New York Inc* 41 NY 2d 564 at p 568, 394 NYS 2d 169, 362 NE 2d 968 (1977) (Cooke J citing *New York Trap Rock Corp v Town of Clarkston* 299 NY 77 (1948) at p 80; *Melker v City of New York* 190 NY 481 (1908) at p 488; Restatement, Torts, nn preceding s 822, p 217). The definition proffered in *Copart Industries Inc v Consolidated Edison Co of New York Inc* was applied in *Hoover v Durkee* 212 AD 2d 839, 622 NYS 2d 348 (1995) at p 840 of the former report; *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91, 761 NYS 2d 192 (2003); and *Wheeler v Lebanon Valley Racing Corp* 303 AD 2d 791, 755 NYS 2d 763 (2003) at p 792 of the former report; and *City of New York v Beretta USA Corporation* 315 F Supp 2d 256 (2004) at p 276.

<sup>392</sup> 213 Ill 2d 351, 821 NE 2d 1099 (2004). The Supreme Court of Illinois reversed the appeal court’s ruling and affirmed the trial court’s finding that the city and county did not state a claim for public nuisance because it could not be established that the defendants conduct created the harm complained of. The plaintiffs advocated the expansion of the common law of public nuisance to encompass nuisance liability in gun production and distribution – an area highly regulated by both state and federal law. The plaintiffs urged that it is not only



“A sufficient pleading in a public nuisance cause of action will allege a right common to the general public, the transgression of that right by the defendant, and resulting injury. *Feder v Perry Coal Co*, 279 Ill App 314, 318 (1935)...”

Justice Garman continued, at page 370:

“A public nuisance has been defined as ‘the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public.’ *Village of Wilsonville v SCA Services Inc*, 86 Ill 2d 1, 21-22, 426 NE2d 824, 55 Ill Dec 499 (1981), quoting W Prosser, *Torts* § 88, at 583 n 29 (4th edn 1971). **Thus, the first element that must be alleged to state a claim for public nuisance is the existence of a right common to the general public. Such rights include the rights of public health, public safety, public peace, public comfort, and public convenience...**”<sup>393</sup>

So what are public rights? Public rights are common law rights which have been consistently enumerated in public nuisance cases over several hundred years and include:

- a public right of way on the highway (see, for example, *R v Moore*<sup>394</sup>);
- a public right of fishing at the foreshore (see, for example, *Lord Fitzhardinge v Purcell*,<sup>395</sup> *Attorney General for British Columbia v Attorney General for Canada*,<sup>396</sup> and *Arnhemland Aboriginal Land Trust v Director of Fisheries (Northern Territory)*<sup>397</sup>);

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within the inherent authority of the Courts, but it is also within their duty, to construe the common law to aid a local government’s effort to protect its citizens from gun violence. The Supreme Court concluded that granting that a public right has been infringed, the allegations of intentional conduct on the part of the defendants were insufficient for public nuisance liability as a matter of law. In addition, proximate cause cannot be established as to the dealer defendants because the claimed harm was the aggregate result of numerous unforeseeable intervening criminal acts by third parties not under defendants’ control. (at p 432).

<sup>393</sup> Note also in Canada, the Supreme Court of Canada adopted as correct the proposition that “any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience” is capable of constituting a public nuisance: *Ryan v Victoria (City)* [1999] SCC 706 at para [52], [1999] 1 SCR 201, followed in *British Columbia v Canadian Forest Products Ltd* [2004] SCC 38 at para [66], [2004] 2 SCR 74, (2004) 240 DLR(4th) 1.

<sup>394</sup> (1832) 3 B&Ad 184.

<sup>395</sup> [1908] 2 Ch 139 at 166-7, followed in *Harper v Minister for Sea Fisheries* [1989] HCA 47, (1989) 168 CLR 314 at pp 329-30 (Brennan J).

- a public right of navigation in the sea (see, for example, *Orr-Ewing v Colquhoun*<sup>398</sup>);
- a public right to use of a public place for recreation; (see, for example, *R v Doncaster Metropolitan Borough Council ex parte Braim*,<sup>399</sup> *North Cronulla Precinct Committee Inc v Sutherland Shire Council*<sup>400</sup>);
- a public right to quietude or a public right to comfort and peaceableness in ones own home (see, for example, *Dewar v City and Suburban Race Course Co*,<sup>401</sup> and *Attorney-General of Ontario v Dieleman*<sup>402</sup>);
- a public right to health (see, for example, *Attorney-General v Luton Board of Health*,<sup>403</sup> *Attorney-General v Birmingham Corporation*<sup>404</sup>); and
- a public right to safety (see, for example, *Gleason v Hillcrest Golf Course Inc*,<sup>405</sup> *Castle v St Augustine's Links Limited*<sup>406</sup>).

These rights are common law rights because they are enforceable, where they are impinged upon by an act or omission, at common law in public nuisance prosecutions or abatement proceedings instituted by the Crown on behalf of the people whose rights are affected. Some of these rights, such as the public right of fishing, are referenced in Magna Carta.<sup>407</sup>

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<sup>396</sup> [1914] AC 153 at p 171 (Viscount Haldane) (adopted by Brennan J in the course of his Honour's reasons in *Harper v Minister for Sea Fisheries* [1989] HCA 47; (1989) 168 CLR 314 at pp 329-30 (Brennan J) )

<sup>397</sup> [2000] FCA 165 (the question for consideration was whether the *Fisheries Act 1988* (NT) excluded or extinguished the public right to fish). See also *Harper v Minister for Sea Fisheries* [1989] HCA 47, (1989) 168 CLR 314 at pp 329-30 (Brennan J), following *Attorney General for British Columbia v Attorney General for Canada* [1914] AC 153 at 170-71 (Viscount Haldane).

<sup>398</sup> (1877) 2 App Cas 839. And, see, *Denaby & Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171 at pp 198-9 (Fletcher Moulton J); *Gann v Free Fishers of Whitstable* [1865] 11 HL Cas 192 at pp 207-08 (Lord Westbury); *Iveagh v Martin* [1961] 1 QB 232 at 272; and *The Swift* [1901] P 168; *Commonwealth of Australia v Yarmirr* [1999] FCA 1668 at para [548]; *The Commonwealth v Yarmirr* [2001] HCA 56 at paras [96]-[98], (2001) 75 ALJR 1582 at p 1604.

<sup>399</sup> The Times, 11 October 1986. In *Doncaster*, McCullough J held that a public right of recreation can be created at common law based on long user, in the instant case being use of a common over many years for recreative activities such as walking, jogging, flying kites and model aeroplanes, picnicking and ball games and French cricket.

<sup>400</sup> [1999] NSWCA 438 at para [4] citing with approval *Brodie v Mann* [1885] 10 App Cas 378, *Poole v Huskinson* (1843) 11 M & W 830, 152 ER 1039, and *R v Oxfordshire County Council; ex parte Sunningwell Parish Council* [1999] UKHL 28, [1999] 3 WLR 160.

<sup>401</sup> [1899] 1 IR 345.

<sup>402</sup> [1994] CanLII 7509 (Ontario Supreme Court).

<sup>403</sup> (1856) 2 Jur NS 180.

<sup>404</sup> (1858) 4 K & J 528, 70 ER 220.

<sup>405</sup> 148 Misc 246, 265 NYS 886 (1933).

<sup>406</sup> (1922) 38 TLR 615.

<sup>407</sup> *Attorney General for British Columbia v Attorney General for Canada* [1914] AC 153 at p 171 (Viscount Haldane) (adopted by Brennan J in the course of his Honour's reasons in *Harper v Minister for Sea Fisheries* [1989] HCA 47; (1989) 168 CLR 314 at pp 329-30 (Brennan J)).

And these rights may find their source in natural law and in jurisprudential thought, which is discussed in Part 1 of this thesis, and may be considered as necessary rights in civic society, with respect to which, as Montesquie writes, there are four principal laws of nature; being peace, nourishment, sexuality, and the desire of living in society.<sup>408</sup>

The juridical pronouncements explicate that a public nuisance arises when *any* annoying, or inconvenient, or dangerous act takes place which affects the public generally. In considering the application of the common law of public nuisance to the human activity of sport, which is surveyed below, it is important to bear in mind the extensiveness of the definition of public nuisance. *Any* sporting activity, or *any* activity associated with or concomitant with the playing of sport, which is an annoyance or inconvenience or obstruction to the public in the enjoyment or exercise of one of their enumerated rights, or which is an endangerment to public health or public safety, may be proscribed as a public nuisance.

#### 4. Is a public nuisance a single act or a continuing offence?

A public nuisance is indictable however long it has existed,<sup>409</sup> and may comprise a single, isolated event,<sup>410</sup> or a continuing state of affairs.<sup>411</sup> Lord Justice Denning, as he then was,

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<sup>408</sup> Montesquieu *De l'Esprit des lois* Bk 1 ch 2: AM Cohler BC Miller and HS Stone (tr)(ed) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 6; JV Prichard (ed) T Nugent (tr) *Montesquieu: The Spirit of Laws* (G Bell and Sons London 1878) at pp 4-5; J Brethe de la Gressaye (ed) *Montesquieu: De l'Esprit des lois* (Société Les Belles Lettres Paris 1950) at pp 22-24; G Truc (ed) *Montesquieu: De L'Esprit des Lois* (Garnier Frères Paris 1949) at pp 7-9. And see PO Carrese *The Cloaking of Power – Montesquieu, Blackstone and the Rise of Judicial Activism* (University of Chicago Press Chicago 2003) at pp 20 and 77, citing R Caillois (ed) *Pléiade edition Oeuvres complètes de Montesquieu* (Gallimard Paris 1949-51) vol 2, Bk 23 chs 1, 7, 20 and 21; Bk 1 ch 2; Bk 3 ch 10; and Bk 6 ch 13.

<sup>409</sup> See *R v Cross* (1812) 3 Camp 224, where Lord Ellenborough CJ said at p 226: “It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance...” See also *Weld v Hornby* (1806) 7 East 195, where Lord Ellenborough CJ stated: “...twenty years acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances, though of longer standing.” See *Fowler v Sanders* (1617) Cro Jac 446, 79 ER 382. In *Dewell v Sanders* (1619) Cro Jac 490, 79 ER 419, the court referred to this case as deciding that ‘none can prescribe to make a common nuisance, for it cannot have a lawful beginning by license or otherwise, being an offence at common law’; and per Montague CJ: ‘Neither the King nor the lord of the manor can give any liberty to erect a common nuisance.’

<sup>410</sup> In *Johnson v City of New York* 186 NY 139, 78 NE 715 (1906) the holding of a single motorcar race on a single occasion was opined to be a nuisance per se by the Court of Appeals of New York: at p 146. See further *Aldridge v Van Patter* [1952] OR 595, [1952] 4 DLR 93, [1952] OWRN 516, where the Ontario High Court held that a single occurrence of a motor car crashing through the barrier of a race track into a public park was capable of amounting to a nuisance. See also *Matheson v Northcote College Board of Governors* [1975] 2 NZLR 106.

noted in *Attorney-General v PYA Quarries Ltd*: "...a private nuisance always involves some degree of repetition or continuance. An isolated act which is over and done with, once and for all, may give rise to an action for negligence or an action under the rule in *Rylands v Fletcher*, but not an action for nuisance... But an isolated act may amount to a public nuisance if it is done under such circumstances that the public right to condemn it should be vindicated."<sup>412</sup> In *Johnson v City of New York*,<sup>413</sup> the holding of a single event of motorcar races on a single occasion was opined to be a nuisance *per se* by the Court of Appeals of New York. Yet, in *Stone v Bolton*,<sup>414</sup> the Court of Appeal for England and Wales held that the isolated event of a cricket ball being hit out of a cricket ground on to the head of a woman standing outside her house on a local road was not capable of amounting to a public nuisance.<sup>415</sup> Lord Justice Jenkins noted, in that case, at page 209:

"I do not think a single isolated act causing direct damage such as the striking of a person on the highway by a cricket ball hit from adjacent premises can properly be brought under the head of nuisance on a highway. The gist of such a nuisance as it seems to me is the causing or permitting of a state of affairs from which damage is likely to result... [T]he plaintiff could only succeed in nuisance on the footing that the playing of cricket on the Cheetham Club's ground amounted to a nuisance which resulted in damage to herself in the shape of the blow she received from the errant ball... I am satisfied that it cannot succeed

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See also *Holling v Yorkshire Traction Company Ltd* [1948] 2 All ER 662 (Court of Appeal), and *Dollman v Hillman Ltd* [1941] 1 All ER 355 (Court of Appeal).

<sup>411</sup> See *Castle v St Augustine's Links Limited* (1922) 38 TLR 615 where the evidence was to the effect that golf balls were very frequently sliced on to or over the public highway from the 13<sup>th</sup> tee. There was evidence of substantial interference with the use and enjoyment of the road. See also *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 at p 182, [1957] 1 All ER 894 at p 900; and *Attorney-General v Blackpool Corporation* (1907) 71 JP 478, where a local authority was restrained from using "The Parade", a promenade for foot-passengers at Blackpool, for the purposes of motorcar races.

<sup>412</sup> [1957] 2 QB 169 at p 191, [1957] 1 All ER 894 at p 908 (Court of Appeal).

<sup>413</sup> 186 NY 139, 78 NE 715 (1906), at p 146 of the former report.

<sup>414</sup> [1950] 1 KB 201, [1949] 2 All ER 851.

<sup>415</sup> The further appeal to the House of Lords was predominated by the case of the tort of negligence. The case of public nuisance, whilst argued on further appeal to the House of Lords, was not explored further in their Lordships judgments, "since it [was] admitted on behalf of the respondent that in the circumstances of this case nuisance cannot be established unless negligence is proved." (*Bolton v Stone* [1951] AC 850 at p 860 (Lord Porter)). For this reason, the Court of Appeal judgment is the authoritative dicta on public nuisance. The only comments made in their Lordships House was to reiterate what the Court of Appeal found and to distinguish to the case of *Castle v St Augustine's Links Ltd*. Lord Oaksey commented at p 863: "The case of *Castle v St Augustine's Links Ltd* is obviously distinguishable on the facts and there is nothing in the judgment to suggest that a nuisance was created by the first ball that fell on the road there in question."

on the facts, which clearly establish that balls have been hit out of the ground only on rare occasions, and, accordingly, that the use of the ground for cricket with the fences as they are, and pitch sited as it is, cannot in itself be said to constitute a continuing source of danger to the neighbourhood or the public.”

Lord Justice Somervell opined the inapplicability of public nuisance to the facts before him, at page 212, in the following manner:

“The case for the plaintiff before us was put, first, on the ground of public nuisance to a highway... I do not think that the striking of a cricket ball by an individual batsman, whether he was, as here, a visitor or whether he had been one of the joint occupiers, could be an indictable misdemeanour by all the occupiers... The question... is whether the fact that once every three or four years a very exceptional hit takes a ball into this highway constitutes a public nuisance.”

Lord Justice Somervell distinguished the case before him, involving the game of Cricket, from an analogous case involving the game of Golf, at page 212 of the report:

“I have derived assistance from the reasoning of Sankey J in the somewhat analogous case of *Castle v St Augustine's Links Ltd*. In that case the plaintiff on a highway was injured by a sliced golf ball driven from a tee. Sankey J found that the tee and lay-out of the hole constituted a public nuisance for which the club was responsible. He found that the hole was so laid out that balls were frequently landed in the highway and that the directors knew or ought to have known this. He found that the highway was much frequented by motors and taxicabs and that on previous occasions balls had struck vehicles passing along the highway. If counsel for the plaintiff is right, it would have been sufficient if on very rare occasions an altogether exceptional shot had reached the highway. Sankey J was, of course, dealing with the facts of that case and with golf, not cricket, but, in considering the number of occasions and the amount of traffic on the road – in other words the degree of risk –

he was, I think, applying the law correctly in dealing with this class of problem, namely, games near highways. Applying this test, namely, one of degree, to the question whether the lay-out of this cricket field was such as to render the highway dangerous in a way that amounted to a public nuisance, I think that it was not.”

The gist of the offence of public nuisance is not the isolated act of hitting a ball on to the highway or neighbouring land, but the organising or carrying on of a game on property adjacent to the highway or neighbouring land whereby the use of that highway or land is rendered dangerous.<sup>416</sup> The decision in *Stone v Bolton* does not suggest that an isolated act cannot amount to a public nuisance in all cases. The cases of *Holling v Yorkshire Traction Company Ltd*,<sup>417</sup> and *Dollman v Hillman Ltd*,<sup>418</sup> were not cited in judgment. Both cases concerned liability for a public nuisance from an isolated event.<sup>419</sup> The question is one of fact; as noted by Lord Justice Somervell. An injury to the use or enjoyment of land, or to the public highway, or to the public peace, may be caused by an isolated act or a state of affairs provided that that isolated act or state of affairs is one which, as a matter of fact, is an inconvenience or annoyance to the public, or endangering of the public peace. Occasional cricket balls being hit from the cricket ground in the case of *Stone v Bolton* do not constitute injury to the public use or enjoyment of the highway because, as decided by the Court of Appeal for England and Wales, such an act is not an obstruction or an inconvenience to the public warranting proscription or remedy as a public nuisance.

Miss Stone’s claim for special damages for a public nuisance arising from being hit on the head by a solitary cricket ball failed;<sup>420</sup> but were the number of cricket balls being hit out of

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<sup>416</sup> RFV Heuston & RA Buckley *Salmond & Heuston on the Law of Torts* (20<sup>th</sup> edn Sweet & Maxwell London 1992) at p 59.

<sup>417</sup> [1948] 2 All ER 662 (Court of Appeal).

<sup>418</sup> [1941] 1 All ER 355 (Court of Appeal).

<sup>419</sup> In *Holling* the Court held that the discharge of smoke and steam from the defendants coke ovens across a highway was a nuisance, albeit that the blanketing of the highway in smoke and steam was very much dependant on the weather and the direction of the wind, and was thus a relatively isolated and unpredictable event. *Holling* was not cited in argument or in the judgments of the Court of Appeal and House of Lords in *Bolton v Stone*. In *Dollman* a single isolated event saw the plaintiff trip on a piece of fat left on the pavement by the defendants butcher’s shop. *Dollman* was cited in argument, but not referred to in judgment.

<sup>420</sup> In the House of Lords, Miss Stone’s claim in negligence, as well as that in nuisance failed; their Lordships holding that the members of the cricket club were not liable in damages to the injured person in negligence or

the defendant's cricket ground frequent, as a matter of historical fact to the case, and thus a cause of public inconvenience, annoyance, or danger, public nuisance might have been proved. This opinion is supported by the judgment in *Castle v St Augustine's Links Limited*.<sup>421</sup> In that case, Sankey J in the King's Bench Division in England, gave judgment against St Augustine's Links Limited and the golfer for the loss of an eye resulting from a golf ball striking the windshield of a taxi cab driven by the plaintiff. Justice Sankey said the user of the thirteenth green was a danger to the public passing along the highway. The evidence satisfied him that many a ball had been sliced onto the public road, because of the design of the hole in question. He did not think that the occurrence of sliced golf balls could be said to be the result of careless play. He held that the directors of the club knew, or they ought to have known, that balls driven from the thirteenth tee frequently landed in the road, thereby creating a public nuisance. Both the House of Lords, per Lord Porter,<sup>422</sup> as well the Court of Appeal, in *Bolton v Stone*, were careful to distinguish the facts in *Castle* from those in the case with which they were concerned.

Concomitant with the judgment in *Stone v Bolton*, it may be appropriately argued that the holding of any sporting event on an occasional isolated occurrence, or an act taking place in a sporting event or associated with a sporting event, might not be a public nuisance because it does not create an inconvenience or annoyance to the public, or an endangerment to the public peace. But such an argument is not conclusive of the law. There are other cases where the courts have held isolated acts, particularly isolated sporting events, and isolated acts at sporting events, to be public nuisances. In *Commonwealth v McGovern*,<sup>423</sup> a sole isolated public boxing match to be staged in the Auditorium in Louisville, Kentucky, on 22<sup>nd</sup> September, 1902, was held to amount to a public nuisance because it endangered the public morals and the public peace.<sup>424</sup> The Court of Appeals of Kentucky noted:

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nuisance since the likelihood of injury was so remote that a reasonable person would not have anticipated it: [1951] AC 850.

<sup>421</sup> (1922) 38 TLR 615.

<sup>422</sup> [1951] AC 850 at p 860. See also p 863 (Lord Oaksey).

<sup>423</sup> 116 Ky 212, 75 SW 261 (1903).

<sup>424</sup> The Court noted at p 236, in reference to the public boxing match to be staged, that: "...Such an assembly could easily be led into a riot, or other unlawful disturbance of the public peace. In addition to the evils suggested, there would be the contaminating effect of such a meeting upon the youth of the city and State, which might prove of incalculable injury to their morals and future welfare. Such a gathering, too, would demand increased vigilance in the protection of the property of the city and its inhabitants, be a menace to good order, and disturb the peaceful pursuits and happiness of citizens who would be unwilling to patronize

“In order to constitute a public nuisance, in the meaning of the law, it is not always necessary that the acts charged should have been habitual or periodical. Where a single act produces a continuing result, the offence may be complete, without a recurrence of the act... To constitute the offence denounced by the statute as a prize-fight, or prize-fighting, it is not necessary that a number of such combats or that more than one combat should take place. We think one such offence at a given place would constitute a public nuisance, and it is the province of a court of equity to prevent nuisances that are threatened, and before irreparable mischief ensues, as well as to arrest or abate those in progress, and by perpetual injunction protect the public against them in the future.”<sup>425</sup>

In *Gleason v Hillcrest Golf Club Inc*, it was held by the Municipal Court of New York that a sole isolated act of a golf ball hit from a golf fairway and on to a plaintiff driving her car on the adjacent public highway could constitute a public nuisance. The court noted and followed *Castle v St Augustine's Links Ltd*, albeit noting that there was evidence that played-at golf balls fell frequently upon the roadway in that case, as opposed to the fact that there was but one single occasion of a golf ball being hit into the roadway in the case at bar.<sup>426</sup> The court in *Gleason* was of the opinion that liability for public nuisance was an absolute liability.<sup>427</sup> A nuisance does not rest upon the degree of care used, but on the degree of danger existing even with the best of care. The court noted authorities wherein liability for public nuisance was created when buildings or parts of building injured travellers in the street, and stated:

“Applying the principles enunciated by the above authorities, no reasonable distinction can be apprehended between the case of a traveller upon a public street being struck by a falling building, or falling

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such an enterprise. We conclude, therefore, that while a court of equity may not grant an injunction against the principals who were expected to engage in the fight in question, nor those connected with them as managers, trainers, etc., because the process of the criminal courts and the powers of conservators of the peace in the city of Louisville are, or ought to be, adequate to the prevention of the prize-fight, by the arrest and prosecution of the parties concerned, yet it was proper for the lower court to enjoin the owner, proprietor and managers of the Auditorium theatre from permitting the holding of a prize-fight therein, and from allowing therein any future exhibitions of the same character, upon the ground that such a use of the building would constitute a public nuisance, dangerous to the public morals and safety.”

<sup>425</sup> 116 Ky 212 (1903) at pp 239-240.

<sup>426</sup> 148 Misc 246, 265 NYS 886 (1933) at p 253 of the former report.

<sup>427</sup> 148 Misc 246 (1933) at pp 253-254.



into an excavation adjoining the roadway upon private property, or being injured by a missile set in motion from private adjacent premises. And if the owner of land contiguous to the highway is liable to a traveller who falls into an excavation on the land, upon the ground that the owner has not provided a means whereby harm might be reasonably averted to one having no cause to expect danger, then by analogous reasoning, the converse situation must also determine liability – that the owner of such premises who creates a condition upon his land, or who maintains such a condition in a manner imputing presumptive knowledge thereof, whereby an object from the land injures a lawful traveller upon the roadway, is in duty bound to take appropriate means to ward off the danger.”<sup>428</sup>

*Gleason v Hillcrest Golf Course Inc* was not cited in argument or in judgment in *Stone v Bolton*. *Stone v Bolton* may be wrong in point of law. The Court of Appeal of England and Wales may have viewed the circumstances of the case with sentimental attitude toward the sport of cricket.<sup>429</sup> It is suggested that *Stone v Bolton* be revisited, and overruled, in subsequent case law.

Further support for this proposition can be found in the judgment of Justice Spence, in the Ontario High Court, in *Aldridge v Van Patter*.<sup>430</sup> *Castle v St Augustine's Links Ltd*, and *Dollman v Hillman Ltd*, were applied in this case; *Stone v Bolton* was not followed. In *Aldridge v Van Patter* the plaintiffs sued variously in nuisance, negligence and under the rule in *Rylands v Fletcher*. A stock car, racing in a car race on a track adjacent to a public park, crashed through a frail fence surrounding the track and injured the plaintiffs who were walking in the park. The act of the racecar crashing through the barrier to a racetrack and into a park was an isolated occurrence. The plaintiffs were not standing against the fence but, rather, walking in the

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<sup>428</sup> *ibid* at p 255.

<sup>429</sup> *Stone v Bolton*, along with Lord Denning's comments in *Miller v Jackson* [1977] QB 966 at p 976, [1977] 3 All ER 338 at p 340, where he states that, “In summertime village cricket is the delight of everyone”, have prompted a judicial suggestion that they represent “a concession to cricket as a national sport of England” rather than a principled application of the law: *Wilkinson v Joyceman* [1985] 1 Qd R 567 at p 590 (McPherson J), cited in *Woods v Multisport Holdings Pty Ltd* [2002] HCA 9, (2002) 186 ALR 145 at fn 44 (Kirby J).

<sup>430</sup> [1952] OR 595, [1952] 4 DLR 93, [1952] OWRN 516.

park and proceeding to the entrance to the track to buy tickets to enter and witness the sporting event. The Ontario High Court held, *inter alia*, that the plaintiffs were entitled to found a claim in nuisance, notwithstanding that there was but the single instance of crashing of a racing car into the public park. Liability under nuisance did not rest on the driver but it did rest on the licensee of the track and also on the licensor. The possibility of a car plunging through the fence during a race was in the immediate contemplation of these parties when they executed their licence agreement.

In *Aldridge v Van Patter*, the defendants questioned whether a claim in nuisance could be based on a *single* sudden emission from the defendant's lands of something which damaged the plaintiff. Justice Spence, quoting Salmon on Torts, observed:

“Nuisance is commonly a continuing wrong – that is to say, it commonly consists in the establishment or maintenance of some state of things which continuously or repeatedly causes the escape of noxious things on to the plaintiff's land (e.g., a stream of foul water, or the constant noise or smell of a factory). An escape of something on a single occasion, however harmful and wrongful (e.g., the escape of water from the bursting of a reservoir), would not in common speech be termed a nuisance. This distinction, however, is not one which admits or requires any legal recognition for the purposes of the law of nuisance. **All wrongful escapes of deleterious things, whether continuous, intermittent, or isolated, are equally to be classed as nuisances in law; for they are all governed by the same principles.**”<sup>431</sup>

His Honour cited *Stone v Bolton* noting that in that action a plaintiff was struck by a cricket ball which passed over a seven foot fence out of the grounds of a cricket club, having been driven from a point about 100 yards away from the plaintiff, in an isolated and rare occurrence; facts similar to the facts in the case before him. Justice Spence commented:

“In my opinion the judgment of the Court of Appeal must be interpreted on the basis of the particular evidence in that case. In fact the members of the court distinguished *Castle v St Augustine's Links Ltd.*...

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<sup>431</sup> [1952] OR 595 at p 610 (emphasis added).

The evidence in the present case shows conclusively that the defendant the Western Fair Association through its officers, particularly Jackson, the general manager, and Saunders, the grounds superintendent, and also the defendant Martin, knew that there was grave and constant danger of competing drivers going through the fence into this public park and in fact on that very afternoon one competitor already had struck and torn down the fence near which the accident occurred, although by chance the vehicle did not proceed beyond the fence. In the circumstances of this case, I find that *Castle v St Augustine's Links Ltd* and not *Bolton v Stone* applies.”<sup>432</sup>

Sir John Smith notes in his work *Criminal Law*, quoting Lord Justice Denning that: “Whereas private nuisance always involves some degree of repetition or continuance, ‘an isolated act may amount to a public nuisance if it is done under such circumstances that the public right to condemn it should be vindicated.’”<sup>433</sup> Whether the act constituting a public nuisance is an isolated act or a state of affairs, a continuing series of acts, is not the determinative factor. Rather, an isolated act or a state of affairs may amount to a public nuisance because the nature of the act or acts is such that it amounts to an inconvenience or annoyance to the public, or a danger to the public, or an act endangering the public morals or the public peace. Single acts may amount to an inconvenience or annoyance to the public, or a danger to the public, or an act endangering public morals or the public peace in some cases, but not in others. The same for continuing acts.

Whether particular conduct, whether an isolated event, or a continuing state of affairs, amounts to a public nuisance at common law is a question of fact. Whether conduct “constitutes a public nuisance must be determined as a question of fact under all the circumstances.”<sup>434</sup> This point is clear upon survey of *Stone v Bolton*, *Castle v St Augustine's*

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<sup>432</sup> *ibid* at pp 611-612.

<sup>433</sup> Sir John Smith *Criminal Law* (8<sup>th</sup> edn Butterworths London 1996) at p 773, quoting [1957] 2 QB at p 192 (Denning LJ)

<sup>434</sup> *New York Trap Rock Corp* 85 NE 2d (1948) at p 875. See also *Hoover v Durkee* 212 AD 2d 839 (1995) where the Appellate Division of the Supreme Court of New York affirmed the trial court's finding that the operation of a racetrack for motorcars was a public nuisance. At p 840 the Court noted: “Whether a nuisance exists, however, depends upon the facts and circumstances in each case.”

*Links Ltd*, and *Aldridge v Van Patter*, discussed above. In *Johnson v City of New York*,<sup>435</sup> where the Court of Appeals of New York opined that a car race about the city streets was a public nuisance per se,<sup>436</sup> the court nonetheless held that the question whether an act amounted to a public nuisance was a question of fact. Chief Justice Cullen, speaking for the court, stated, at page 151:

“The learned counsel for the respondent has argued at length that the character of the road, the curve in it, the nature of its pavement and similar matters rendered it dangerous and improper to conduct a contest by automobiles, and that considering the number of persons naturally attracted to such a spectacle the contest was so dangerous as to constitute a public nuisance within the definition of the Penal Code (Penal Code, s. 385, sub. 4.) Whether the contest as conducted was in fact a nuisance, whether the defendants, or any of them, were guilty of negligence in the management of the race and the contributory negligence, if any, on the part of the plaintiff, were all questions of fact which the trial court should have submitted to the jury for determination.”

## 5. Concluding remarks

A public nuisance occurs when a single act (or omission) or continuing actions (or omissions) obstructs, interferes with, or endangers the public in the exercise of their common rights in a manner which obstructs or interferes with the use by the public of a public place, or endangers the life, health, property, safety, or comfort of the public. The first element that must be alleged to state a claim for public nuisance is the existence of a right common to the general public. Such rights, as enumerated by judgments in public nuisance cases, include the rights of public health, public safety, public peace, public

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<sup>435</sup> 186 NY 139, 78 NE 715 (1906) (Court of Appeals of New York)

<sup>436</sup> The Courts actual words were: “The occupation of the highway was to be exclusive in the parties to whom the permission [to hold the race] was granted. Therefore, the race or speed contest held by the defendants was an unlawful obstruction of the highway and per se a nuisance.” (at p 146).

comfort, public convenience, and public use of public places. The act of staging a publicly exhibited sport event is no exception to this common law rule.

In *R v Shorrock*<sup>437</sup> a case of prosecution of a public nuisance, the Court of Appeal for England and Wales explained that a public nuisance gives rise to a liability both in criminal and civil law. It can attract the sanction of a criminal charge, either at common law or under statute in those jurisdictions where public nuisance offences are codified, or civil liability pursuant to a relator action or a claim for damages. Whichever proceeding is pursued, the definition of a public nuisance is the same.<sup>438</sup> The reason for this is because a public nuisance remains a public wrong whether criminal or civil proceedings are instigated.

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<sup>437</sup> [1994] QB 279, [1993] 3 WLR 698 (Court of Appeal). *R v Shorrock* was approved by the House of Lords in *R v Rimmington*, *R v Goldstein* [2005] UKHL 63 at para [56], [2006] 1 AC 459, [2006] 2 All ER 257.

<sup>438</sup> In *R v Shorrock*, *ibid* at pp 701-702, Justice Rattee, speaking for the Court of Appeal for England and Wales, applied the definition of public nuisance provided by *Archbold* and *Stephen*, as well as the dicta of Romer and Denning, LJ, in *Attorney General v PYA Quarries Ltd* ([1957] 2 QB 169, [1957] 1 All ER 894) concluding with the remarks: “Not surprisingly the appellant accepts that the activities carried on on his field constituted a public nuisance within the above definitions, and that anyone properly found to have been responsible for such nuisance could be convicted on indictment of the common law offence of public nuisance.” In *R v Shorrock*, *ibid*, the defendant parted with possession or occupation of his land knowing that there was a real risk that the activities (an ‘acid house’ dance music concert) that were going to be conducted on his land by others would constitute a nuisance. He was convicted of the misdemeanour of public nuisance and his conviction was affirmed by the Court of Appeal. See also *R v Goldstein*, *R v R* [2004] 1 WLR 2878 at p 2882 (Lord Justice Latham).

## Chapter 6

### The meaning of ‘public’ in public nuisance

#### 1. How many people must an act affect so as to amount to a public nuisance?

A public nuisance is an offence which, as defined by the authorities cited above, must affect the public. How have the courts defined the degree to which the public must be affected? How many people comprise ‘the public’ for the purposes of a conviction for the offence or abatement of the nuisance by relator action?

Whether an annoyance or injury is sufficiently widespread so as to amount to a public nuisance, rather than a private nuisance, is a question of fact. In *R v White and Ward*,<sup>439</sup> the defendants had been found guilty of a public nuisance on an indictment which charged that “at the parish of Twickenham, etc., near the King’s Common highway there, and near the dwelling-houses, of several of the inhabitants, the defendants erected twenty buildings for making noisome, stinking and offensive liquors.” Objection was made that the indictment was only laid generally “in the parish of Twickenham.” Lord Mansfield rejected the objection, saying: “It is sufficiently laid, and in the accustomed manner. The very existence of the nuisance depends upon the number of houses and concourse of people: and this is a matter of fact, to be judged by the jury.”<sup>440</sup>

Blackstone says that a public nuisance must be an annoyance to *all* the King’s subjects.<sup>441</sup> But this is obviously too wide, for if it were so, no public nuisance could ever have been proved. In the leading case of *Attorney-General v PYA Quarries Ltd*, Lord Justice Romer

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<sup>439</sup> (1757) 1 Burr 333, 97 ER 338.

<sup>440</sup> *ibid* at p 337.

<sup>441</sup> Sir W Blackstone *Commentaries on the Laws of England* (Clarendon Press Oxford 1765-1769) vol iii, at p 216.

commented that: “It is difficult to ascertain with any precision from these citations how widely spread the effect of a nuisance must be for it to qualify as a public nuisance and to become the subject of a criminal prosecution or of a relator action by the Attorney-General. It is obvious, notwithstanding Blackstone’s definition, that it is not a prerequisite of a public nuisance that all of Her Majesty’s subjects should be affected by it; for otherwise no public nuisance could ever be established at all.”<sup>442</sup>

In *Soltan v De Held*,<sup>443</sup> Kindersley VC said: “I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance – an injury or a damage, to all persons who come within **the sphere of its operation**, though it may be so in a greater degree to some than it is to others.” Romer LJ noted in *Attorney-General v PYA Quarries Ltd* that several cases had dealt with the quandary of defining the nature of the term ‘public’ for the purposes of sustaining a conviction or an injunction for a public nuisance.<sup>444</sup> His Lordship referred to *R v Price*,<sup>445</sup> wherein a question arose as to whether the burning of a dead body, instead of burying it, amounted to a public nuisance. In the course of his charge to the jury in *R v Price* Stephen J commented: “The depositions in this case do not state very distinctly the nature and situation of the place where this act was done, but if you think upon inquiry that there is evidence of its having been done in such a situation and manner as to be offensive to any **considerable number of persons**, you should find a true bill.”<sup>446</sup>

In *Attorney-General v Keymer Brick and Tile Co Ltd*,<sup>447</sup> a further case on public nuisance noted by Lord Justice Romer, Joyce J stated: “The only question I have to decide is purely one of fact, namely, whether or not what the defendants have done has created or occasioned a public nuisance within the **neighbourhood** of their brickfields. Now, in law a public nuisance need not be injurious to health. It is not necessary to show that people have been made ill by what had been done. It is sufficient to show that there has been what is called injury to their comfort, a material interference with the comfort and convenience of life of the persons residing in or coming within **the sphere of the influence** of that which has been

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<sup>442</sup> [1957] 2 QB 169 at p 182; [1957] 1 All ER 894 at p 900.

<sup>443</sup> (1851) 2 Sim NS 133 at p 142 (*italics mine*).

<sup>444</sup> [1957] 2 QB 169 at pp 182-184, [1957] 1 All ER 894 at pp 900-902.

<sup>445</sup> (1884) 12 QBD 247.

<sup>446</sup> *ibid* at p 256 (*emphasis added*).

<sup>447</sup> (1903) 67 JP 434.

done by the defendants on their works...”<sup>448</sup> The form of injunction granted in that case was (so far as relevant) to restrain the defendants from performing specified acts “so as by noxious or offensive odours or vapours arising therefrom or otherwise to be or occasion a nuisance to the annoyance of persons in the neighbourhood of the defendants’ brickfields and lands, or so as to be or become injurious to the public health.”

In *Ganim v Smith & Wesson Corp*,<sup>449</sup> the Supreme Court of Connecticut resolved a case on the threshold question of whether the plaintiff mayor and city had standing to assert a claim of public nuisance.<sup>450</sup> The Connecticut Court in the course of their judgment commented on the ambit of a nuisance amounting to a public nuisance at common law:

“Nuisances are public where they violate public rights, and produce a common injury, and where they constitute an obstruction to public rights, that is, the rights enjoyed by citizens as part of the public... If the annoyance is one that is common to the public generally, then it is a public nuisance... The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the **citizens generally who may be so circumstanced** as to come within its influence.”<sup>451</sup>

Thus, the case law demonstrates that the term public, for the purposes of sustaining an action for a public nuisance, connotes a **sphere of operation, a considerable number of persons affected, a neighbourhood affected, or citizens generally circumstanced within the influence of a public nuisance**. A sporting activity satisfying the first element of the offence of public nuisance, namely an interference or endangerment of a public right, need not affect everybody, and only needs to impact upon a relatively small number of persons to amount to a public nuisance.

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<sup>448</sup> Emphasis added.

<sup>449</sup> 258 Conn 313, 780 A2d 98 (2001).

<sup>450</sup> *ibid* at pp 343-344 of the former report.

<sup>451</sup> 258 Conn 313 at p 369, quoting *Higgins v Connecticut Light & Power Co* 129 Conn 606 at p 611, 30 A2d 388 at p 391 (1943) (emphasis added).



In the case of *Attorney-General v PYA Quarries Ltd.*, Romer LJ was of the view that the expression ‘the neighbourhood’ had been regarded as sufficiently defining the area affected by a public nuisance. In support of this he cited *Attorney-General v Stone*,<sup>452</sup> *Attorney-General v Cole*,<sup>453</sup> and *Attorney-General v Corke*.<sup>454</sup> His Lordship observed:

“... [A]ny nuisance is ‘public’ which materially affects the reasonable comfort and convenience of life of a class of Her Majesty’s subjects. The sphere of the nuisance may be described generally as ‘the neighbourhood’; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has so been affected for an injunction to issue.”<sup>455</sup>

Lord Justice Denning, as he then was, in concurrence with Romer LJ stated:

“The question: when do a number of individuals become Her Majesty’s subjects generally? is as difficult to answer as the question: when does a group of people become a crowd? Everyone has his own views. Even the answer ‘Two’s company, three’s a crowd’ will not command the assent of those present unless they first agree on ‘which two’. So here I decline to answer the question how many people are necessary to make up Her Majesty’s subjects generally. I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.”<sup>456</sup>

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<sup>452</sup> (1895) 12 TLR 76.

<sup>453</sup> [1901] 1 Ch 205.

<sup>454</sup> [1933] Ch 89, 48 TLR 650.

<sup>455</sup> [1957] 2 QB 169 at p 184, [1957] 1 All ER 894 at p 902.

<sup>456</sup> [1957] 2 QB 169 at pp 190-191, [1957] 1 All ER 894 at p 908.

Similar reasoning was adopted by the Supreme Court of New York in *State of New York v Waterloo Stock Car Raceway Inc.* In this case, the State brought an action against the defendant operators of a motorcar racetrack for abatement of a public nuisance. In the course of their judgment, the court noted: “[The] number of persons affected need not be shown to be ‘very great’... Enough that so many are touched by the offence and in ways so indiscriminate and general that the multiplied annoyance may not unreasonably be classified as a wrong to the community.’ [It is a public nuisance] where the location at which and the manner in which the [particular operation] is conducted is such that it causes substantial annoyance and discomfort indiscriminately to many and diverse persons who are continually or may from time to time be in the vicinity.”<sup>457</sup>

In *Attorney-General v PYA Quarries Ltd* the nuisance was held to be sufficiently public where the inhabitants of about 30 houses (only a limited number of the residents living in the community concerned with the nuisance), as well as portions of two public highways, were affected by dust and vibration. The local authority, on relator action, obtained an injunction to prevent quarry owners committing a public nuisance by blasting operations that deluged a village with dust and stones. The Court of Appeal held that the question whether the local community within the sphere comprised a sufficient number of persons to constitute a class of the public was a question of fact in every case, and confirmed that the judge, having determined that question against the defendants, had rightly granted the injunction.

What is important to note from the case law cited on this point is that a nuisance does not have to affect all the public or even a majority of the public. All that is required to sustain proceedings for a public nuisance is that the offensive or disturbing act, comprising the nuisance, is one which indiscriminate in its affects, affecting a neighbourhood or a group of people spectating at a sporting event, for example, or a community living in proximity to a sports stadium or arena, or any persons who may be exercising a public right within **the sphere of influence** of the purported nuisance. In such circumstances the common law

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<sup>457</sup> 96 Misc 2 d 350 (1978) at p 356 (Conway J), citing *People v Rubenfeld* 254 NY 245 (1930) at p 247 (Cardozo CJ), and *Town of Mount Pleasant v Van Tassell* 7 Misc 2d 643, 645, aff'd 6 AD 2d 880; *People v HST Meth* 74 Misc 2d 920. See also *Hoover v Durkee* 212 AD 2d 839, 622 NYS 2d 348 (1995) where the Appellate Division of the Supreme Court of New York noted likewise (at p 840 of the former report, citing *People v Rubenfeld* 254 NY 245 (1930) at p 247).

does not require the individuals affected by the nuisance to instigate their own expensive litigation to abate or prosecute the nuisance, but, rather, charges the Executive Government with the responsibility to prosecute or seek an abatement of the nuisance on their behalf. In *Stein v Gonzales*,<sup>458</sup> at page 265, in dealing with an application by a group of private property owners to restrain prostitution activity in their neighbourhood, McLachlin J. stated: “As long as the suffering or inconvenience is general, there is no place for independent intervention by private citizens. This rule, which prevents individuals from taking upon themselves the role of champions of the public interest, has been said to be established ‘for the purpose of preventing oppression by means of a multiplicity of civil actions for the same cause’...” The same result was reached in *Wheeler v Lebanon Valley Auto Racing Corporation*.<sup>459</sup>

In the case of *R v Shorrock*,<sup>460</sup> where the Crown succeeded in the criminal prosecution of a public nuisance, Justice Rattee adopted the comments of Lord Denning and Lord Justice Romer in *Attorney General v PYA Quarries*. In this case the appellant accepted, as a matter of law, that an electronic dance music rave concert carried on on his field, of which he had no knowledge, constituted a public nuisance within the definition provided by Romer and Denning, LJ, and that anyone properly found to have been responsible for such nuisance could be convicted on indictment of the common law offence of public nuisance.<sup>461</sup> The judgments of Romer and Denning, LJ, in *Attorney General v PYA Quarries Ltd*, have been applied in judgments from various common law countries: *R v Madden*,<sup>462</sup> *R v Johnson*,<sup>463</sup> *R v*

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<sup>458</sup> (1984) 14 DLR (4th) 263 (British Columbia Supreme Court), citing Sir John W Salmond *Salmond & Heuston on the Law of Torts* (18<sup>th</sup> edn Sweet & Maxwell London 1981) at p 83.

<sup>459</sup> 303 AD 2d 791, 755 NYS 2d 763 (2003). In that case, the plaintiffs were residents located within approximately two miles of a racetrack operated by the defendants. In the Supreme Court, an order was granted prohibiting races, certain preparatory activities and other events from taking place at the speedway on Mondays, Tuesdays or Thursdays and directing that noise from all racing related activities not begin prior to 10:00 a.m. or end later than 11:00 p.m. on the days when racing is permitted. On appeal, the Appellate Division of the Supreme Court of New York found that owing to the fact that all persons in the affected community would be ‘similarly impacted’ by exposure to ‘unacceptable’ noise levels during the Speedway’s activities and owing also to the absence of proof of special injury, the trial court erred in allowing the residents to prosecute the action as one to enjoin a public nuisance.

<sup>460</sup> [1994] QB 279, [1993] 3 WLR 698, [1993] 3 All ER 917 (Court of Appeal).

<sup>461</sup> [1993] 3 WLR 698 at p 702.

<sup>462</sup> [1975] 1 WLR 1379, [1975] 3 All ER 155 (Court of Appeal). The Court held that it was an offence to commit a public nuisance by making a bogus telephone call falsely giving information concerning the presence of explosives.

<sup>463</sup> [1996] 2 Cr App R 434 (Court of Appeal). The Court dismissed the appellants appeal against conviction. The appellant was rightly convicted of a public nuisance by making numerous telephone calls to numerous women on numerous occasions over a six year period. It was a nuisance because the Court was satisfied that

*Shorrock*,<sup>464</sup> *R v Goldstein*, *R v R.*,<sup>465</sup> and *R v Rimmington*, *R v Goldstein*,<sup>466</sup> in *Bathurst City Council v Saban (No 2)*,<sup>467</sup> *Vincent v Peacock*,<sup>468</sup> and in *Attorney-General for Ontario v Orange Productions Ltd.*<sup>469</sup> In *British Columbia (Attorney General) v Haney Speedways Ltd.*,<sup>470</sup> the dicta of Romer and Denning LJ was applied and the operation of a speedway on which the sport of motorcar racing was conducted on a Sunday was held to be a public nuisance entitling permanent injunction. Seven neighbouring families gave evidence that their Sundays were made hideous by the operation of the speedway.<sup>471</sup> The British Columbia Supreme Court held that these seven families comprised a sufficient number of persons to constitute a class of the public, and the Attorney-General was entitled to an injunction against operation of the speedway as being a public nuisance in that there was “an inconvenience materially interfering with the ordinary physical comfort of human existence, according to plain and sober and simple notions obtaining among the people of this Province.”<sup>472</sup>

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the telephone calls had been so widespread in their range that it would not have been reasonable to expect one person to take proceedings on her own behalf.

<sup>464</sup> [1994] QB 279, [1993] 3 WLR 698, [1993] 3 All ER 917 (Court of Appeal).

<sup>465</sup> [2003] EWCA Crim 3450 at paras [5]-[6], [2004] 1 WLR 2878 at p 2881.

<sup>466</sup> [2005] UKHL 63 at para [18] (Lord Bingham of Cornhill), [2006] 1 AC 459, [2005] 3 WLR 982.

<sup>467</sup> (1986) 58 LGRA 201 (Supreme Court of New South Wales Equity Division) BC8601183 at 5. The Court held that excess rubbish on private land was a public nuisance for which an injunction ought to be granted. Justice Young stated, at BC8601183 at 6: “In my view, if there is a private nuisance involved, that private nuisance would be so wide-spread as to be actionable as a public nuisance. The evidence clearly shows that not only are a whole block of approximately 16 houses affected by the defendants’ activities, but that the range is wider than that so that there is a site within five blocks of Bathurst City Centre which is passed by a great number of Her Majesty’s subjects and which, according to the evidence, has become an objectionable eyesore and talking-point. Furthermore, it is quite clear from the evidence, whether justified or not, the neighbours are frightened of the defendants and have the view that were they to speak to him about the matter or take action against him individually, there might be adverse repercussions. The reasonableness of this apprehension is reinforced by the fact that there is evidence that threats have been made to Council officers of physical violence when they have entered the defendants’ land.”

<sup>468</sup> [1973] 1 NSWLR 466 (New South Wales Court of Appeal).

<sup>469</sup> [1971] 21 DLR (3d) 257 (Ontario High Court). The Court granted an injunction to restrain the holding of an outdoor rock concert at which some 30,000 people attended causing trespass to private property, excessive noise and dust and traffic congestion affecting a small community. Chief Justice Wells commented, at p 269: “In my opinion, the whole festival with the weight of numbers and the noise and the dust, was a painful and troublesome experience for all those living in the neighbourhood and was, in fact, a social disaster to those who normally live there.”

<sup>470</sup> [1963] 39 DLR (2d) 48 (British Columbia Supreme Court).

<sup>471</sup> *ibid* at p 54.

<sup>472</sup> *ibid*.

## 2. Summary

It is not the number of people affected by a public nuisance which makes a public nuisance offence. Rather, a public nuisance is made out if a public right – such as those public rights enumerated in public nuisance judgments, the public right to use of public places for recreation,<sup>473</sup> or the public right to quietude<sup>474</sup> – is impinged upon. *R v Rimmington*, *R v Goldstein*<sup>475</sup> refers to the need for **common injury**. *City of Chicago v Beretta USA Corporation*<sup>476</sup> refers to transgression of a **right common to the general public**, such as transgression of rights of public health, public safety, public peace, public comfort, or public convenience.

A nuisance does not have to affect the entire public in order to amount to a public nuisance. It is sufficient, as a matter of law if the nuisance affects only seven families,<sup>477</sup> or sixteen households,<sup>478</sup> or thirty households.<sup>479</sup> This is an important aspect of common law public nuisance caselaw, and is particularly relevant when considering the application of public nuisance to the human activity of sport. A sport event which is staged on public beaches, or public roads, such as a triathlon race, a road cycling race, or a marathon, need only create an obstruction, inconvenience or annoyance to as few as seven households or to a small group of beachgoers. It is sufficient if the nuisance is indiscriminate in its' operation affecting a relatively small number of persons on whose behalf the Executive, as *parens patriae*, ought to institute proceedings to prosecute or abate it.

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<sup>473</sup> See *Hue v Whiteley* [1929] 1 Ch 440 at p 445 cited with approval in *Jones v Bates* [1938] 2 All ER 237 at p 241 (Slesser LJ), at p 245 (Scott LJ); *Attorney-General and Newton Abbot RDC v Dyer* [1947] Ch 67 at p 85. And see *R v Doncaster Metropolitan Borough Council ex parte Braim* The Times, 11 October 1986, where McCullough J held that a public right of recreation can be created at common law based on long user, in the instant case being use of a common over many years for recreative activities such as walking, jogging, flying kites and model aeroplanes, picnicking and ball games and French cricket. And see, further, *North Cronulla Precinct Committee Inc v Sutherland Shire Council* [1999] NSWCA 438 at para [4] citing with approval *Brodie v Mann* [1885] 10 App Cas 378, *Poole v Huskinson* (1843) 11 M & W 830, 152 ER 1039, and *R v Oxfordshire County Council; ex parte Sunningwell Parish Council* [1999] UKHL 28, [1999] 3 WLR 160 at p 168, cited at paras [5] and [6] in *North Cronulla Precinct Committee* (Sheller JA).

<sup>474</sup> See *Dewar v City and Suburban Race Course Co* [1899] 1 IR 345; *Attorney-General of Ontario v Dieleman* [1994] CanLII 7509 (Ontario Supreme Court).

<sup>475</sup> [2005] UKHL 63 at para [12] (Lord Bingham of Cornhill), [2006] 1 AC 459, [2005] 3 WLR 982.

<sup>476</sup> 213 Ill 2d 351 (2004) at pp 369-70.

<sup>477</sup> *Attorney General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (British Columbia Supreme Court).

<sup>478</sup> *Bathurst City Council v Saban (No 2)* (1986) 58 LGRA 201 (Supreme Court of New South Wales, Equity Division, 13 March 1986) BC8601183 at 5.

<sup>479</sup> *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169, [1957] 1 All ER 894.

At common law, sports ought to be conducted in such manner so as not to amount to an annoyance, disturbance, inconvenience or obstruction, or dangerous to the public peace, to a relatively small representative cross-section of the community. Applying this aspect of the law of public nuisance to the occurrence of violent and riotous activity at a football game, such as that between South Melbourne and Preston on 17<sup>th</sup> April, 2005,<sup>480</sup> for example, we may rightly conclude that the 9,000 or so spectators at the game comprise a number of people, a class of Her Majesty's subjects, on whose behalf the Executive might take action. The riot, being caused by some of the fans of the football clubs who are brought together into a highly charged environment by the holding of the sport event, may be an act which is an endangerment to public safety. The actions of participants in the riot or violent conduct, including the invasion of the sport pitch and the use of darts and bottles as weapons, may be correctly held to be widespread in its range and indiscriminate in its affect, to adopt the words of Lord Justice Denning in *Attorney-General v PYA Quarries Ltd.* The 9,000 or so spectators, no doubt comprising women and children, as well as hooligans, may constitute a class of the public. But it is not the fact of whether it is 9,000 or nine spectators. A public nuisance is made out if there is endangerment to a public right such as public safety. The acts at the football stadium may be a public nuisance because they injure the public right to safety, because citizens generally who may be so circumstanced as to come within the riotous or violent influence may be harmed, whether such injury is connoted by physical injuries incurred by flying rockets and bottles, or by fear for one's safety, or otherwise.

In a different scenario, the long queues which have formed annually outside on Church Road, Wimbledon, outside the Wimbledon tennis compound where the Wimbledon Championship tennis tournament is staged, need only inconvenience or cause obstruction to as few as seven households. It may well be that such a queue amounts to a public nuisance at common law, which public nuisance is correctly enjoined at the suit of the Attorney General. The appropriation of the footpath by hopeful attendees to the tennis tournament, desirous of a ticket, with such persons camped on the footpath, and often sleeping overnight, or over a number of days, eating, and staking out their place in the queue, on the public footpath, over a considerable number of hours and days, may amount to a public

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<sup>480</sup> See n 24, above, and the accompanying text.

nuisance being an obstruction to the highway or being an inconvenience to as few as seven households representative of the public. And again a public nuisance might be made out not because the queue contains 9,000 or because 9,000 people are affected by the formation of the queue. A public nuisance might be made out because a public right is impinged, namely a public right of way on the highway (including the pavement, sidewalk, or footpath), and this public right of way cannot be exercised by members of the public.

And what of our beachgoing family – our family whose Sunday recreation is precipitately interrupted by a sports event promoter desiring to stage a triathlon, a surfing tournament, a beach cricket match, or a surf-lifesaving championship event on the beach? This family, in conjunction with other individuals or families on the beach in question would satisfy the term “public” under the definition of public nuisance. These families and individuals on the beach experience a “common injury” and come within the “sphere of influence” of the public sporting activity. And again, it is not the number of people on the beach who are affected by the staging of the sport event on the beach which justifies a public nuisance suit. Rather, it is the fact that a public right to use of a public place is affected by such sport events which leads to a public nuisance being created. Our beachgoing family is but a symbol or representation of the impingement of public rights. They may obtain redress yet.

## Chapter 7

### The mental element of the common law offence of public nuisance

It is a presumption of the common law that *mens rea* is an essential ingredient of a criminal offence except where Parliament has expressly provided to the contrary by clear and unambiguous language or where the presumption is excluded by necessary implication.<sup>481</sup>

“The general rule as to *mens rea* is clear and plain. It is a well established rule of the common law that an act is not criminal unless it is the product of a guilty mind.”<sup>482</sup>

The common law principle as to *mens rea* has been stated by Sir Frederick Jordan in *R v Turnbull*,<sup>483</sup> with whom Davidson and Street, JJ, concurred, and which was affirmed by Brennan, J, of the High Court of Australia in *He Kaw The v R*<sup>484</sup>: “...assuming his mind to be sufficiently normal for him to be capable of criminal responsibility, it is also necessary at common law for the prosecution to prove that he knew that he was doing the criminal act which is charged against him, that is, that he knew that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing.”

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<sup>481</sup> See *Sweet v Parsley* [1970] AC 132 (House of Lords); *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] 1 AC 1 (Privy Council); *R v O'Connor* (1980) 29 ALR 449 (High Court of Australia); *He Kaw The v R* (1985) 157 CLR 523 (High Court of Australia) (Gibbs CJ, Mason J, agreeing, and Brennan J). In *Bank of New South Wales v Piper* [1897] AC 383 at pp 389-90, their Lordships said: “It was strongly urged by the respondent’s counsel that in order to the constitution of a crime, whether common law or statutory, there must be *mens rea* on the part of the accused, and that he may avoid conviction by showing that such *mens* did not exist. That is a proposition which their Lordships do not desire to dispute...” In *R v O'Connor* (1980) 29 ALR 449 at p 472, 146 CLR 64 at pp 96-7, Justice Stephen stated the modern approach to *mens rea*: “As Stephen J pointed out in *R v Tolson* (1889) 23 QBD 168 at 187: ‘The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed...’”

<sup>482</sup> *R v Turnbull* (1943) 44 SR (NSW) 108 at p 109 (Jordan CJ)

<sup>483</sup> (1943) 44 SR(NSW) 108 at p 109.

<sup>484</sup> (1985) 157 CLR 523 at p 572.



However, recklessness may be a sufficient mental element of some offences, and there is no single mental element that is common to all offences.<sup>485</sup>

In the guiding case of *Sherras v De Rutzen*,<sup>486</sup> applied in *Sweet v Parsley*,<sup>487</sup> *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong*,<sup>488</sup> *R v O'Connor*,<sup>489</sup> and *He Kaw The v R*,<sup>490</sup> it was stated by Wright J that: “There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals...”<sup>491</sup> His Lordship, noting that there were other isolated and extreme cases, stated that the principal classes of exceptions to the rule that *mens rea* must be established in statutory as well as common law offences may be reduced to three: (1) where the acts were not criminal in any real sense, but were acts which in the public interest are prohibited under a penalty, e.g., statutes treating as prohibited the innocent possession of adulterated food or tobacco; (2) **acts constituting public nuisances**,<sup>492</sup> and (3) where the proceeding though criminal in form, is really only a summary mode of enforcing a civil right.<sup>493</sup>

In *Pregelj and Wurramura v Manison*,<sup>494</sup> Justice Nader, in the Supreme Court of the Northern Territory of Australia, in reference to Justice Wright’s summation that the common law offence of public nuisance might be an exception to the rule that *mens rea* applied to all criminal offences, commented, obiter, that: “It is to be noticed that Wright J did not assert unequivocally that *mens rea* did not apply to all public nuisance cases. The cases referred to by Wright J are significant because they seem to have helped to propagate the learning that

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<sup>485</sup> *Sweet v Parsley* [1970] AC 132 (House of Lords) at p 162 (Lord Diplock).

<sup>486</sup> (1895) 1 QB 918.

<sup>487</sup> [1970] AC 132 (House of Lords).

<sup>488</sup> [1985] 1 AC 1 (Privy Council).

<sup>489</sup> (1980) 29 ALR 449 (High Court of Australia).

<sup>490</sup> (1985) 157 CLR 523 (High Court of Australia).

<sup>491</sup> (1895) 1 QB 918 at p 921.

<sup>492</sup> Justice Wright’s actual words in *Sherras v De Rutzen* (1895) 1 QB 918 at p 921, concerning the public nuisance cases were: “Another class comprehends some, and perhaps all, public nuisances. In *R v Stephens* (1866) LR 1 QB 702, 7 B & S 710, where the employer was held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders; and it was so in *R v Medley* (1834) 6 C & P 292 and *Barnes v Akroyd* (1872) LR 7 QB 474.”

<sup>493</sup> (1895) 1 QB 918 at p 921.

<sup>494</sup> [1987] NTSC 76 at para [31], (1987) 51 NTR 1.

public nuisance cases form one of the groups of cases in which *mens rea* is attenuated: see eg, *Norley v Malthouse* (1924) SASR 268 at 269-270; *Normandale v Brassey* (1970) SASR 177 at 182...” His Honour continued: “The policy reasons for prosecutions for public nuisance... were clearly intended to ensure that persons with the capacity in the course of their industrial or business undertakings to cause significant detriment to large numbers of the public should run their undertakings in peril of punishment if they failed to take proper precautions to prevent the detriment from occurring.”

In the judgment of *R v Shorrock*,<sup>495</sup> the Court of Appeal for England and Wales dealt with the mental element in the common law offence of public nuisance expressly. The court held that *mens rea* was a requirement of the offence of public nuisance; and that it is enough that the defendant *knew or ought to have known* that a nuisance would be caused.<sup>496</sup> Sir John Smith notes, of this case, that, “in effect that the offence is one of negligence.”<sup>497</sup> In *R v Shorrock*, the appellant granted a license for the weekend use of his field on which the licensees held an ‘acid house party’ music event attended by between 3,000 and 5,000 people, each paying £15 to attend the event. The event was publicised on local radio and in posters. Marquees were erected on the field; electricity generators and loud speakers were placed about the field. Police became aware of the event and, fearing public disturbance, successfully obtained an

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<sup>495</sup> [1994] QB 279, [1993] 3 WLR 698, [1993] 3 All ER 917 (Court of Appeal). *R v Shorrock* was approved and followed by the United Kingdom House of Lords in *R v Rimmington*, *R v Goldstein* [2005] UKHL 63 at paras [21], [35] and [56] (Lord Bingham of Cornhill) (Lord Roger of Earlsferry), [2006] 1 AC 459, [2005] 3 WLR 982. Lord Roger of Earlsferry stated in *R v Rimmington*: “Particularly having regard to the essentially regulatory nature of much of the law of public nuisance, it seems to me that, even if it is unusual, the mens rea described in *Shorrock* is apt in situations where the offence truly applies. I would accept the reasoning in *Shorrock*.” (at para [56]). Subsequent to this case, the United Kingdom Parliament passed legislation to outlaw the activities the subject of this case: see, ss 61-71 Criminal Justice and Public Order Act 1994 (UK).

<sup>496</sup> This holding was approved and followed in *R v Rimmington*, *R v Goldstein* [2005] UKHL 63 at para [39] (Lord Bingham of Cornhill) and at para [56] (Lord Roger of Earlsferry), [2006] 1 AC 459, [2005] 3 WLR 982. The decision in *Shorrock* is consistent with the decision of the Privy Council in *Wagon Mound (No 2)*, *Overseas Tankship (UK) Ltd v The Miller Steamship* [1967] 1 AC 617, [1966] 3 WLR 498. That case concerned a suit for damages in nuisance and negligence. The appellants had committed a public nuisance in discharging oil into Sydney Harbour. The oil subsequently caught fire and caused extensive damage to the respondents’ vessels. Lord Reid stated, at p 644 of the former report: “In the present case the evidence shows that the discharge of so much oil on to the water must have taken a considerable time, and a vigilant ship’s engineer would have noticed the discharge at an early stage. The findings show that he ought to have known that it is possible to ignite this kind of oil on water, and that the ship’s engineer probably ought to have known that this had in fact happened before. The most that can be said to justify inaction is that he would have known that this could only happen in very exceptional circumstances; but that does not mean that a reasonable man would dismiss such risk from his mind and do nothing when it was so easy to prevent it. If it is clear that the reasonable man would have realised or foreseen and prevented the risk, then it must follow that the appellants are liable in damages.” (emphasis added).

<sup>497</sup> Sir John Smith (ed) *Smith & Hogan Criminal Law* (8<sup>th</sup> edn Butterworths London 1996) at p 775.

injunction from the High Court to restrain the holding of the event. The police caused the injunction to be read aloud at the site, to little effect. **The appellant was not present during any part of the event held on his field.** The local police received 275 telephone complaints from residents who were disturbed by the noise generated by music played and by speech relayed over a public address system that was installed on the field.

The appellant was charged with the common law offence of public nuisance. The appellant accepted that a public nuisance had been caused, but denied that he had had the requisite knowledge to be criminally liable. At trial the judge directed the jury that in order to convict the defendant they had to be sure that he either knew or *ought to have known* of the risk of a public nuisance being caused by his licensees. The jury convicted the defendant. He was fined £2,500. On appeal to the Court of Appeal for England and Wales, the issue concerned the requisite *mens rea*, which the Crown had to prove to establish guilt. Giving the judgment of a Court of Appeal which also included Simon Brown LJ and Popplewell J, Rattee J reviewed the authorities and concluded that the requisite mental element of the common law offence of public nuisance was that elucidated by the House in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880: the appellant was guilty of the offence charged, “if either he knew or he ought to have known, in the sense that the means of knowledge were available to him, that there was a real risk that the consequences of the licence granted by him in respect of his field would be to create the sort of nuisance that in fact occurred.”<sup>498</sup> Actual knowledge of the nuisance need not be established to prove the offence.<sup>499</sup>

In reaching their decision on the *mens rea* of public nuisance, the Court of Appeal in *R v Shorrock* applied *R v Moore*,<sup>500</sup> a sporting case in which the defendant was indicted, and found guilty, of a public nuisance. In *R v Moore*, the defendant maintained a rifle shooting range, at which people shot at fixed targets and at pigeons, on land abutting the public highway. A large number of people congregated outside the defendant's land on the public highway in order to shoot the pigeons which escaped from the guns on the defendant's land. The

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<sup>498</sup> [1994] QB 279 at p 289; approved by the House of Lords in *R v Rimmington, R v Goldstein* [2005] UKHL 63 at para [21] and [39] (Lord Bingham of Cornhill) and para [56] (Lord Roger of Earlsferry), [2006] 1 AC 459, [2005] 3 WLR 982.

<sup>499</sup> [1993] 3 WLR 698 at p 706.

<sup>500</sup> (1832) 3 B & Ald 184.

defendant was indicted for the resultant public nuisance. Lord Tenterden CJ directed the jury in the sense that the defendant was responsible for the activities of the people gathering on the highway. He gave leave, however, for the defendant to argue the point in the Court of Kings Bench. In the course of his judgment in that court, Lord Tenterden CJ said at page 188: “If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. And this is an old principle.” Littledale J was of the opinion that a public nuisance is caused if the obstruction or interference with the rights of the public is the probable consequence of his act, though not actually intended:

“It has been contended that to render the defendant liable, it must be his object to create a nuisance, or else that must be the necessary and inevitable result of his act. No doubt it was not his object, but I do not agree with the other position; because if it be the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it.”<sup>501</sup>

The mental element of the common law offence of public nuisance is now settled, following the decision of the United Kingdom House of Lords in *R v Rimmington, R v Goldstein*. The House approved and followed *Shorrock* stating: “the correct test was that laid down by the Court of Appeal in *R v Shorrock* [1994] QB 279, 289, that the defendant is responsible for a nuisance which he knew, or ought to have known (because the means of knowledge were available to him), would be the consequence of what he did or omitted to do.”<sup>502</sup>

In applying the mental element requirement of the offence of public nuisance to the human activity of sport it is clear, from the cited authorities, that a sports organisation, for example, or the directors of such sports organisation, or the proprietor of a sports arena, may be liable for a public nuisance offence where a sporting event creates or causes an interference with or obstruction to the public exercising their public rights such as a right of way on the highway (*R v Moore*) or a right to quietude (*R v Shorrock; Dewar*) or a right to safety (*Gleeson*). If a sports organisation or sports promoter fails to do something which they ought to have

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<sup>501</sup> (1832) 3 B & Ald 184 at p 188.

<sup>502</sup> [2005] UKHL 63 at para [39], [2006] 1 AC 459, [2005] 3 WLR 982. See also at para [56].

done to protect public safety in staging, managing or conducting a public sporting event, they will be liable for a public nuisance offence. Following *Shorrock* and *Rimmington* such persons are liable if they either know or ought to know (because the means of knowledge were available to them) that staging a particular sporting event, or staging a sporting event at a certain time or a certain place, or staging a sport event involving particular teams whose supporters are prone to violent acts, compromises public safety. This reasoning justified the finding that the use of a golf hole on a golf course adjacent a public highway constituted a public nuisance when a golf ball was hit on to the highway, injuring a driver of a car. It is not the intention of the perpetrator of a public nuisance which justifies a finding of public nuisance, but rather the effect of the perpetrators actions on the public, even when the perpetrator is being careful. In *Gleason v Hillcrest Golf Course Inc*, the court stated : “A nuisance does not rest upon the degree of care used, but on the degree of danger existing even with the best of care.”<sup>503</sup>

A sports organisation or sports promoter will be liable if their publicly exhibited sport event impinges on public rights of quietude, such as occurred in the case of *Dewar*. They will be liable if their publicly exhibited sport event obstructs or causes inconvenience to the public exercising a public right of way on the highway, such as occurred in *Johnson v City of New York*. Sports organisations, directors, promoters, administrators, and professional athletes do not have to intend to create a public nuisance, nor do they have to intend to obstruct or interfere with public rights. It is sufficient that they ought to have known that their acts or omissions would impinge public rights.

In a beach scenario, the sports organisation, sports promoter or professional athlete may be liable for a public nuisance offence if they either know or ought to know (because the means of knowledge are available to them) that staging their sport event on the beach impinges on the public’s right to use of that beach or the foreshore for their recreation.

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<sup>503</sup> 148 Misc 246 (1933) at p 254.

## Chapter 8

### Remedies against a public nuisance

#### 1. Remedy at the plaint of the Crown

The proper course in an action for a public nuisance was for an indictment to be preferred against the offender.<sup>504</sup> Sir John Smith records in *Criminal Law* that: “Public nuisance is a misdemeanour at common law triable either way (citing *Criminal Law Act 1977 (UK)*, s. 16 and Sch 2.)”<sup>505</sup> The person who commits a common law public nuisance, where such nuisance is not codified, incurs liability to a maximum penalty of life imprisonment and unlimited fines.<sup>506</sup> But criminal prosecution of common law public nuisances virtually died as a method for dealing with nuisances during the nineteenth century.<sup>507</sup>

In addition to the criminal sanction, a person who commits a public nuisance can be ordered to stop it by an injunction, and made to pay damages in tort if it causes anyone loss. From the mid-nineteenth century a unique procedure developed whereby a relator action or *ex officio* action in Chancery might be brought by the Attorney-General to secure an injunction. This procedure developed because of the inherent difficulties in prosecuting corporations for common law crimes. The Attorney-General, or another Minister of the Crown, as a trustee of the public interest, brings such proceedings either on his own initiative or on the

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<sup>504</sup> See *Note* (1465) YB Pas 5 Edw IV, f 2, pl 4 (Heydon), noted in JH Baker *English Legal History* (Butterworths London 1990) at p 493.

<sup>505</sup> Sir John Smith (ed) *Smith & Hogan Criminal Law* (8<sup>th</sup> edn Butterworths London 1996) at p 772; (10<sup>th</sup> edn Butterworths London 2002) at p 772.

<sup>506</sup> For a critical examination of the history and contemporary relevance of the crime of public nuisance, see further JR Spencer ‘Public Nuisance – A Critical Examination’ (1989) 48 CLJ 55 at pp 56-66 and 76-80.

<sup>507</sup> *ibid*, at p 71.

‘relation’ of persons affected.<sup>508</sup> The more popular remedy for the crime of public nuisance, and the usual method of repressing it, is not prosecution in the criminal courts, but injunction issued in the civil courts.<sup>509</sup> This makes the common law crime of public nuisance a unique remedy, at the insistence of the Executive branch of government, for acts or omissions odious or harmful to public rights. It is a unique remedy for acts or omissions in sport, which may be odious or harmful to public rights.

*Russell on Crimes* notes that the remedies for public nuisances are:

- (1) Indictment, or, in exceptional cases, criminal information, at the instance of the Attorney-General, or by leave of the High Court;
- (2) Action by the Attorney-General, where an injunction is desired to put an end to a public nuisance, whereby the proceeding is on behalf of the Crown or those who enjoy its prerogative or for a public wrong (citing *Attorney-General v Logan* [1891] 2 QB 100; *Attorney-General v Hannwell UDC* [1900] 2 Ch 377; *London County Council v Attorney-General* [1902] AC 165). The Attorney-General may sue *ex officio* or *ex relatione*, the relator being made co-plaintiff where practicable. Such proceedings are usually taken in the Chancery Division, but occasionally in the King’s Bench Division of the High Court.<sup>510</sup>
- (3) Summary proceedings, where a statute defines the nuisance, or prescribes or allows a summary remedy.<sup>511</sup>

Any Minister of the Crown – not only the Attorney-General – may sue for an abatement of a public nuisance. This was the express holding in *Victoria v Second Comet Pty Ltd*.<sup>512</sup> In contesting the claim for public nuisance the defendants argued that the State of Victoria, as

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<sup>508</sup> For a chronicle of the relator action as an alternative to prosecution, see JR Spencer ‘Public Nuisance – A Critical Examination’ (1989) CLJ 55 at pp 66-73. Note, however, that any Minister or Agency of the Crown may maintain an action to abate a public nuisance. This was the express holding in *Victoria v Second Comet Pty Ltd* (Supreme Court of Victoria, 7691 of 1992, 21 December 1994) BC9405877 at paras [25]-[26].

<sup>509</sup> *ibid* at p 66.

<sup>510</sup> *Attorney-General (ex rel Pratt) v Brisbane City Council* [1988] 1 Qd R 346 is a modern example of a relator action brought in respect of a public nuisance constituted by excessive user of a public way in Queensland. *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91, 761 NYS 2d 192 (2003) is a modern example of an *ex officio* action brought in respect of a public nuisance alleged to be constituted by the manufacture and distribution of firearms in New York.

<sup>511</sup> See JW Cecil Turner (ed) *Russell on Crimes* (10<sup>th</sup> edn Stevens & Sons London 1950) vol I, at pp 1670-1671.

<sup>512</sup> (Supreme Court of Victoria, 7691 of 1992, 21 December 1994) BC9405877 at paras [25]-[26].

plaintiff had no standing to sue for public nuisance. They relied upon the authority of *Wallasey Local Board v Gracie*,<sup>513</sup> wherein Sterling J said at page 597: “It is well settled that no person can sue in respect of public nuisance, except either the Attorney-General, or a person suffering particular damage.” The respective agency of the State of Victoria bringing the action was a Major Projects Unit of the Land Authority. It was argued that *Wallasey Local Board v Gracie* was distinguishable because that case involved an attempt by a local authority to sue for abatement of a public nuisance. In the instant case, the Crown itself was the litigant. Justice Coldrey noted that: “In this State, pursuant to s 22 of the Crown Proceedings Act 1958, the Crown could itself sue and be sued under the title ‘State of Victoria’. In these circumstances it would be quite unnecessary and legally superfluous for there to be a requirement that the Attorney-General - an officer of the Crown - be a party to a suit at the relation of the Crown. Indeed, it was asserted that the maxim *maxis continet minus* (the greater contains the lesser) applied.” His Honour concluded: “Whilst I was referred to no specific Australian authority on this point I find the plaintiff’s submission to be persuasive. If it were otherwise one might be faced with the extraordinary situation of an Attorney-General, as an officer of the Crown, refusing to consent to relator proceedings which the Crown sought to instigate. Accordingly I regard the plaintiff as having the requisite standing to pursue its claim.”

Injunctions and declarations are customarily sought in public law suits in order to enforce an obligation. An injunction may be sought to enforce statute law – such as in restraining a public authority from acting *ultra vires* and in aid of rights conferred by that statute, which are unlikely to be proprietary rights – or to enforce common law obligations.<sup>514</sup> Declarations may be sought together with injunctions in order to have a court state with finality the nature of the legal rights and obligations in dispute.<sup>515</sup> The Executive of government has made use of both the civil remedy<sup>516</sup> and criminal prosecution<sup>517</sup> in recent years in remedying public nuisances.

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<sup>513</sup> (1887) 36 Ch 593.

<sup>514</sup> D Maclean ‘Injunctions’ in P Parkinson (ed) *Principles of Equity* (LBC Sydney 1996) at pp 620, 632.

<sup>515</sup> J Stuckey-Clarke ‘Declarations’ in P Parkinson (ed) *Principles of Equity* (ibid) at p 843.

<sup>516</sup> *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91, 761 NYS 2d 192 (2003); *Attorney-General (ex rel Pratt) v Brisbane City Council* [1988] 1 Qd R 346; *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 (Court of Appeal).



## 2. Decision to sue is not reviewable

The Crown – acting through their Attorney-General or another Minister – may make a determination to sue to abate a public nuisance in the affirmative or negative. The decision of the Crown is not reviewable at common law. In *Little v State of Victoria*,<sup>518</sup> the Court of Appeal of the Supreme Court of Victoria noted, at paragraph [19]:

“The decision of the Attorney-General whether or not to give consent to the initiation of a relator action resides exclusively in the Attorney-General, and a refusal of consent is binding and not open to question in the courts: See *London City Council v Attorney-General* [1902] AC 165 at 168-169 per the Earl of Halsbury, LC; and *Gouriet* at 478-9. One of the justifications for this principle is that the decisions to be made as to the public interest are not such as courts are fitted or equipped to make and, since they are apt to attract political criticism and controversy, are outside the range of discretionary problems which the courts can resolve.”

Similarly, the decision of the Attorney-General on whether to grant consent to a relator action is not reviewable. The Court of Appeal of England and Wales held in *Gouriet v Union of Post Office Workers*, by a majority (Lawton and Ormrod LJ) that the court had no power to review the decision of the Attorney-General in refusing consent to relator proceedings.<sup>519</sup>

This principle was upheld on appeal, Lord Wilberforce in the House of Lords stating:

“For the proposition that [the Attorney-General’s] only concern is to ‘filter out’ vexations and frivolous proceedings, there is no authority – indeed, there is no need for the Attorney-General to do what is well within the power of the court. On the contrary he has the right, and the duty, to consider the public interest generally and widely. It was this

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<sup>517</sup> *R v Rimmington*, *R v Goldstein* [2005] UKHL 63, [2006] 1 AC 459, [2005] 3 WLR 982; *R v Shorrock* [1993] 3 WLR 698; *R v Ong* [2001] 1 Cr App R(S) 404; *R v Ruffell* (1991) 13 Cr App R (S) 204.

<sup>518</sup> [1999] VSCA 113.

<sup>519</sup> *Gouriet v Union of Post Office Workers* [1977] UKHL 5, [1978] AC 435 at p 474.

consideration which led to the well known pronouncement of the Earl of Halsbury LC in 1902, for the suggestion was being made that the court could enquire whether, when the Attorney-General had consented to relator proceedings, the public had a material interest in the subject matter of the suit. ‘...The initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General’ (*LCC v Attorney-General* [1902] AC 165 at pp 168-69 per Earl of Halsbury LC, at p 170 per Lord Macnaghten). To limit this passage to a case where the Attorney-General has given his consent (as opposed to a case where he refuses consent) goes beyond legitimate distinction: it ignores the force of the words ‘whether he ought to initiate litigation... or not’ (at p 168). It is the decision on the public interest that is binding whichever direction that takes. That a refusal is binding had never been contested; that it was so was explicitly decided in firm terms in relation to the fiat in *Ex parte Newton* (1855) 4 E & B 869, a case cited to but not noticed by the Court of Appeal.”<sup>520</sup>

### 3. Only the Crown may sue to abate a public nuisance and protect public rights

In *Gouriet v Union of Post Office Workers*,<sup>521</sup> an individual member of the public, complaining of a threatened breach of the criminal law, sought the consent of the Attorney-General for institution of relator action proceedings. The Attorney-General refused his consent. The question for the United Kingdom House of Lords was whether an individual was entitled to proceed in a claim for declaratory relief and interim injunction without asserting special interest or damage and in spite of the refusal of the Attorney-General to consent to the use

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<sup>520</sup> *Gouriet v Union of Post Office Workers* [1977] UKHL 5, [1978] AC 435 at p 478 (Lord Wilberforce).

<sup>521</sup> [1977] UKHL 5, [1978] AC 435 (House of Lords), followed in *Byrnes v John Fairfax Publications Pty Ltd* [2002] NSWSC 658 at para [8]; followed in *Little v State of Victoria* [1999] VCSA 113 at para [18] (Supreme Court of Victoria Court of Appeal).

of his name in relator proceedings. The House held that only the Attorney-General could sue on behalf of the public for the purpose of preventing public wrongs and that a private individual could not do so on behalf of the public; though he might be able to do so if he would sustain special and particular injury as a result of a public wrong. The House held, further, that the court had jurisdiction to declare public rights but only at the suit of the Attorney-General, *ex officio* or *ex relatione*, since he was the only person recognised by public law as entitled to represent the public in a court. In passing judgment, Lord Diplock referred to “the exclusive right of the Attorney-General to represent the public interest in litigation.”<sup>522</sup> Lord Wilberforce declared that, “the exclusive right of the Attorney-General to represent the public interest” was not technical, procedural or fictional but “constitutional”, even where individuals “might be interested in a larger view of the matter.”<sup>523</sup> Further, his Lordship stated:

“A relator action – a type of action which has existed from the earliest times – is one in which the Attorney-General, on the relation of individuals (who may include local authorities or companies) brings an action to assert a public right. It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights.”<sup>524</sup>

Argument was also raised in *Gouriet* that the Attorney-General’s role in relator suits for abatement of public nuisances was fictitious, because the Attorney-General did not run such cases. This argument was made to support the principle contention that the Attorney-General’s refusal of consent to a relator action by Mr Gouriet was reviewable in the courts.

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<sup>522</sup> [1978] AC 435 at p 500.

<sup>523</sup> *ibid* at p 481.

<sup>524</sup> *ibid* at p 477, followed in *Little v State of Victoria* [1999] VSCA 113, BC9904478.

To this Lord Wilberforce in the House of Lords responded: “But the Attorney-General’s role has never been fictional. His position in relator actions is the same as it is in actions brought without a relator (with the sole exception that the relator is liable for costs: *AG v Lockermouth Local Board* LR 18 Eq 172, 176, per Jessel MR). He is entitled to see and approve the statement of claim, and any amendment in the pleadings, he is entitled to be consulted on discovery, the suit cannot be compromised without his approval; if the relator dies, the suit does not abate.”<sup>525</sup> Lord Edmund-Davies stated similarly, albeit more emphatically:

“In his seminal work (*The Law Officers of the Crown*, 1964, pp 286-295) Professor John Edwards discussed the ancestry of the modern relator action and the suggestion that it originated from the procedure whereby the Attorney-General, representing the Crown as *parens patriae*, would proceed by way of information to enforce rights of a charitable nature for the benefit of interested persons. Nowadays, he says, at p 288: ‘In effect, a relator’s action in form is simply a suit brought by the Attorney-General at the relation, or instance, of some other person. Although the Attorney-General is the nominal plaintiff in the action, in reality the action is brought by the complainant. Once the consent of the Attorney-General is obtained, the actual conduct of the proceedings is entirely in the hands of the relator, who is responsible for the costs of the action’. These features led Ormrod LJ ([1977] 1 WLR 344D) to say that, ‘...there is a fictional element in these relator actions’. But the reality is that having consented, the Attorney-General nevertheless remains *dominus litis*. Contrary to certain observations in *Attorney-General v Sheffield Gas Consumers Co* (1853) 3 De GM & G 304, the Attorney-General not only can, but does, scrutinize and criticize draft pleadings, and directs what interlocutory steps should be taken. And it is undoubted law that he can continue relator proceedings even though the relator has died, and that no compromise can be arrived at without his concurrence. His role is, accordingly, far from purely fictional, and it is not easy to see why Ormrod LJ described the relator procedure as

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<sup>525</sup> *Gouriet v Union of Post Office Workers* [1977] UKHL 5, [1978] AC 435 at p 478 (Lord Wilberforce).

‘obsolete’. On the contrary, it remains a well nurtured, vigorous and useful plant.”<sup>526</sup>

The Attorney-General’s role in relator actions for public nuisance is indelibly clear. A distinction should be heeded between the court’s jurisdiction in relation to the Attorney-General’s special functions and powers when he is acting as *parens patriae* on behalf of the Crown and in the exercise of a prerogative power, and the court’s exercise of greater control over the executive through judicial review of administrative action, such as in *Laker Airways Ltd v Department of Trade*.<sup>527</sup> If the individual, who can show no special interest in a public nuisance, could take over the Attorney-General’s constitutional role it would be an interference with his exercise of a prerogative power. In *Gouriet*, in the Court of Appeal for England and Wales, the Attorney-General himself submitted: “The function of the Attorney General here in issue is one of many functions of a discretionary character exercised only by him, divorced from the collective responsibility of ministers in government. Some are statutory, such as the grant or withholding of his fiat for certain types of prosecution; others are of ancient origin, such as his power to go to the court *ex officio*, his relator function, and his power to bring before the court matters which he asks the court to say are contempt of court. The common factor in the exercise of those functions is his answerability to Parliament alone and not to the courts.”<sup>528</sup>

The principle underscoring the judgments in *Gouriet* is that the Executive arm of government – whether acting through their Attorney-General or through some other Cabinet Minister or Secretary – performs a unique role in protecting public rights through *ex officio* or *ex relatione* proceedings. This unique role is one founded on constitutional law principles, as Lord Wilberforce reminds us in *Gouriet*: “The Attorney-General’s right to seek, in the civil courts, anticipatory prevention of a breach of the law, is a part or aspect of his general power to enforce, in the public interest, public rights. The distinction between public rights, which the Attorney-General can and the individual (absent special interest) cannot seek to enforce, and

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<sup>526</sup> *Gouriet v Union of Post Office Workers* [1977] UKHL 5, [1978] AC 435 at p 508 (Lord Edmund-Davies).

<sup>527</sup> [1977] QB 643.

<sup>528</sup> [1977] QB 729, at p 742; [1977] 1 All ER 696.

private rights, is fundamental in our law. To break it, as the plaintiff's counsel frankly invited us to do, is not a development of the law, but a destruction of one of its pillars.”<sup>529</sup>

Other courts have similarly commented on the unique nature of the Attorney-General's standing to sue for abatement of a public nuisance. In *Attorney-General of New York v Sturm, Ruger & Co Inc*, Justice Rosenberger, in his dissentient judgment in the New York Court of

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<sup>529</sup> *Gouriet v Union of Post Office Workers* [1977] UKHL 5, [1978] AC 435 at p 482 (Lord Wilberforce). cf Viscount Dilhorne's comment at [1978] AC 435 at p 490 that, “anyone can if he wishes start a prosecution without obtaining anyone's consent.” There was a historical right, well recognized, whereby an individual wishing to see the law enforced could bring a private prosecution. This historical right is preserved in modern law, albeit that it might be affected by statutory limitations. In *Gouriet v Union of Post Office Workers* [1977] UKHL 5, [1978] AC 435 at p 477, Lord Wilberforce described this as an historical role “which goes right back to the earliest days of our legal system...” and “though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a *nolle prosequi*) remains a valuable constitutional safeguard against inertia or partiality on the part of authority.” In Halsbury's Laws of Australia [H Gibbs *Halsbury's laws of Australia* (Butterworths Sydney 1991-) vol 9 paragraph 130-13225, under the heading ‘Who can prosecute’ the following entry appears: “Subject to the statutory provisions which create the offence, any person can commence a prosecution if the breach of law is of a public nature. That right is not taken away except for express words of the legislation, and the fact that a person is specified as having a right to commence does not mean that no other person can.” See also *Brebner v Bruce* (1950) 82 CLR 161 (HCA) where Fullagar J quoted from the judgment of Hood J (speaking for the court) in *Steane v Whitcomb* (1906) VLR 704, where his Honour had said: “...[W]e may start with the proposition that, generally speaking, any person may be the informer, but sometimes the statute giving the penalty allows only particular persons to be informers... The presumption thus being that any person may be the informant, we then look to the Statute imposing the penalty to see if there be any express or implied limitation. There are three classes of Statutes in the construction of which questions of this kind have frequently arisen. In the first class the fact the offence is of a public nature – *Cole v Coulton* (1980) 2 El & El 695, 121 ER 261; *Sargood v Veale* (1891) 17 VLR 660; *Lizars v Sabellberg* (1905) VLR 608 – or that the Legislature has shown that it intended it to be dealt with as an offence of a public nature by providing that it be heard in the ordinary manner and before the ordinary tribunals (*R v Stewart* (1896) 65 LJ MC 83), has led the Court to the conclusion, in the absence of some fairly plain indication to the contrary, that any member of the public may prosecute. In the second class the destination of the penalties or the nature and description of the offence, as one in which only certain persons or bodies, or certain classes of persons are interested, has resulted in a decision that the information must not be in the name of any person other than one of those indicated. In these cases, if nothing more appears, the information must be laid or exhibited by, or must at least show on its face that it is laid at the instance and with the authority of the persons or one of the persons interested... The third class differs from the second in that the Legislature has, by further or other provisions, shown an intention that an officer or employee, or it may be a person authorized for the purpose, may lay an information in his own name, though for the benefit of the person or persons interested.” In *Mensinga v DPP* [2003] ACTCA 1 at para [39] the Court of Appeal observed: “It should be noted that the function of instituting proceedings is not exclusive to the Director [of Public Prosecutions]. Any person can commence a prosecution if the breach of the law is of a public nature and this right is not displaced except by clear words in a particular statute or statutory instrument: *R v Thompson* (1991) 58 A Crim R 81 at 84 per Priestley JA.” And in *A v New South Wales* [2007] HCA 10 at para [49], (2007) 233 ALR 584, the High Court of Australia affirmed that: “criminal proceedings can be instituted by any member of the public. During the nineteenth century, there was much debate in England and Wales about who should control prosecutions. It is not necessary to trace these controversies. A private individual's ability to institute criminal proceedings remained unaffected although the creation of public prosecuting authorities normally introduced provisions for them to take over, and sometimes to terminate, such proceedings.” [citing Cornish ‘Defects in Prosecuting – Professional Views in 1845’ in PR Glazebrook (ed) *Reshaping the Criminal Law* (Stevens London 1978) at p 305; Australia The Law Reform Commission *Standing in Public Interest Litigation* Report No 27 (1985) at pp 182-183, para [343]; and *Gouriet v Union of Post Office Workers* [1977] UKHL 5, [1978] AC 435 at p 477 (Lord Wilberforce).]

Appeal, drew attention to the fact that the nature of a civil suit for abatement of a public nuisance, at the behest of the sovereign power of a state, is very different both in its character and also in the nature of the remedy sought from other types of nuisance suits.<sup>530</sup> His Honour noted that: “the majority and the motion court fail to distinguish between a cause of action for abatement of a public nuisance by the State acting in *parens patriae* and other types of ‘nuisance’ actions...”<sup>531</sup> Differentiating public nuisance abatement causes of action by the state from private nuisance claims, which involve disturbance with an individual’s right in land, and public nuisance actions for damages brought by private plaintiffs, where special and particular injury to the private plaintiff must be shown, Justice Rosenberger viewed the role of the sovereign authority as intrinsic in the civil suit for abatement of a common law public nuisance. This is manifest at page 111 of the record where His Honour states: “In contrast to private nuisance actions and public nuisance actions by private plaintiffs, both of which are brought primarily for monetary damages, **public nuisance abatement actions are encompassed within a state’s traditional police powers, exercised to protect the health and well-being of the public by requiring the offending defendants to abate the actions that create or contribute to the public nuisance...**”

Justice Rosenberger’s dissenting judgment highlights the important constitutional function of the Executive of Government in redressing public nuisances even in a highly regulated and legislated environments. What makes the civil action of the Attorney-General for abatement of a public nuisance germane in the modern era is the fact that it encompasses a broader public law aspect. His Honour states at page 109: “Where the real party in interest is the ‘People,’ that is, the populace of a sovereign state, the appropriate agency or official may properly institute an action for abatement ‘as *parens patriae* of those individuals who have been or will be injured by the alleged public nuisance’ (*State of New York v Bridgehampton Road Races Corp* 44 AD2d 725, 726, 354 NYS2d 717 (1974));... The cause of action for public nuisance developed from the principle that an ‘infringement of the rights of the crown, or of the general public, was a crime’ (Prosser and Keeton, Torts § 86, at 617 [5<sup>th</sup> edn])....” Every person is responsible to the sovereign not to cause or to contribute to a public nuisance. In

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<sup>530</sup> *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91 (2003) at pp 110-111.

<sup>531</sup> *ibid* at p 110.

suits brought by the Attorney-General, there is no issue of negligence, of the need to balance the interests of disputing parties, of the attribution of fault, or of compensation for damages.

If a public nuisance exists it ought to be abated; period. Justice Rosenberger states:

“While private nuisance claims and public nuisance claims for damages incorporate traditional negligence notions of foreseeability, proximate cause and fault, state-initiated public nuisance abatement claims are founded on the theory that the State can obtain abatement of a condition that is injurious to the public. As such they are not negligence actions, nor are they governed by negligence concepts (*see New York v Shore Realty Corp, supra*, 759 F2d at 1050-1051;...”

...[A] public nuisance abatement action brought by the State as *parens patriae* begins with a determination that public nuisance – or harm to the public – exists, works backwards to identify the individuals or entities who are causing or contributing to the harm, and concludes with a determination of what actions, if any, those individuals or entities should be required to take to abate the nuisance. Questions of pinpointed duty, foreseeability, remoteness, intent, or the ‘wrongfulness’ of defendant’s conduct are not at issue in public nuisance *abatement* actions brought by the State. Every individual and entity is responsible to the State and the general population not to cause or contribute to a public nuisance and may be required to take ameliorative actions to diminish his, her, or its contribution to the nuisance, regardless of whether the creation of the nuisance was foreseeable or whether defendant’s conduct in creating or contributing to the nuisance was wrongful.”<sup>532</sup>

What Justice Rosenberger underlines in his judgment in *Attorney-General of New York v Sturm, Ruger & Co Inc* is that the civil remedy for a common law offence of public nuisance is different in its character, and in the nature of the remedies available, from other suits because it is a public law offence and a public law remedy. Public nuisance is an offence

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<sup>532</sup> 309 AD 2d 91 (2003) at pp 112-113.



intimately associated with the duty of every citizen, living in modern complex society, to refrain from creating nuisance or harm to fellow citizens. The overseer of this public law offence is the Executive of Government who, as *parens patriae*, has responsibility to ensure that individuals abide by their duty to refrain from creating nuisance. Law is directed to the minimisation of harm in public nuisance suits; not to retribution. Nuisance is harm. The act creating the harm may be a public nuisance in fact and may be abated pronto without recourse to Parliament for legislative intervention. This is an important principle, particularly where a newly devised sport may be practised which is inimical to the community wherein it is desired to practise it, and action against such a sport is desired quickly. Note, for example, the recently devised sport of dwarf-throwing where dwarves are hurled by burly men across a room for a certain distance.

The *Toronto Star* newspaper reported in June, 2003, that the Member of Parliament for Windsor West, in Ontario, Canada, on behalf of her constituents who were disgusted with the activity, had requested intervention from the Public Safety Minister to prevent an intended dwarf-throwing event to take place. Legislation was introduced into Parliament at very short notice to attempt to ban the activity, but legal concerns were raised by lawyers for the Attorney-General. The bill stalled. Under the proposed bill those who engaged in dwarf-tossing could be fined by up to \$5,000 or imprisoned for six months.<sup>533</sup> The Member of Parliament who sought a remedy on behalf of her constituents was purportedly left without a remedy to prevent the activity occurring upon the erroneous assumption that only *new legislation* might provide a remedy. Yet, had the Attorney-General for Ontario received appropriate legal advice on learning that the dwarf-throwing contest was to take place, rather than attempt to introduce legislation in Parliament at short notice the Attorney-General ought to have instituted an ex-officio suit to enjoin the contest as a public nuisance. The Executive of Government could have obtained, without recourse to Parliament, in a very short space of time, an interim injunction, pending a perpetual injunction, to abate the proposed dwarf-throwing event. Not only were issues of public morality of concern, but

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<sup>533</sup> C Mallan 'MPP Comes Up Short Trying to Stop Dwarf-tossing Contest' *Toronto Star* (Toronto Canada, 13 June 2003) News, at p A19. Note, further, that dwarf-throwing is banned in Florida as well as in France. See 'Judge Tosses Out Dwarf-throwing Lawsuit' *St Petersburg Times* (Florida, 28 February 2002) at p 3B; S Nebehay 'Projectile Dwarf Case Thrown Out' *The Independent* (London England, 28 September 2002) Foreign News at p 17.

further there were issues of public safety for the dwarves because dwarves have brittle bones. Dwarf-throwing may have constituted a public nuisance on grounds of the need to protect public order and public morality.

In a separate case before the *United Nations Human Rights Committee*, the Committee commented, in dismissing a complaint against the French proscription of the sport, that the ban “was necessary in order to protect public order, which brings into play considerations of human dignity,” and hence not in breach of Article 26 discrimination.<sup>534</sup> A dwarf brought his case before the Committee consequent to an order on 27<sup>th</sup> October 1995 of the Council of State of France, which had overturned an earlier Versailles administrative court ruling. The Council of State was of the opinion first, that dwarf tossing was an attraction that affronted human dignity, respect for human dignity being part of public order and the authority vested in the municipal police being the means of ensuring it, and second, that respect for the principle of freedom of employment and trade was no impediment to the banning of an activity, licit or otherwise, in exercise of that authority if the activity was of a nature to disrupt public order.<sup>535</sup> Such perspective is consistent with the jurisprudence of public nuisance. A sport which may otherwise be lawful may be unlawful if such activity might disrupt public order, including consideration of human dignity.<sup>536</sup> The protection of public order, including human dignity and public morality, is an underlying aspect of the constitutional prerogatives of the Executive of Government as *parens patriae*, as police power, and as administrator of the law.

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<sup>534</sup> Case CCPR/C/75/D/854/1999 *Wackenheim* [2002] UNHRC 29 <<http://www.worldlii.org/int/cases/UNHRC/2002/29.html>> (10 May 2005) para [7.4]. The ban on the sport was effected through the French Ministry of the Interior, which issued a circular on the policing of public events, and in particular dwarf tossing, instructing prefects to use their policing powers to direct mayors to keep a close eye on spectacles staged in their communes. In the instant case the aggrieved dwarf was the subject of a mayoralty order of 25 October 1991 by the mayor of Morsang-sur-Orge. The United Nations Human Rights Committee decided that France’s ban on the activity of dwarf throwing did not constitute discrimination within the meaning of article 26 of the International Covenant on Civil and Political Rights. See also — ‘Dwarf Appeal Tossed’ *Herald Sun* (Melbourne Australia, 2 October 2002) News at p 9.

<sup>535</sup> *ibid* at paras [2.3]-[2.6]

<sup>536</sup> Note, also, the decision of the Court of Appeals of Kentucky in *Commonwealth v McGovern* 116 Ky 212 (1903) at p 236, where a boxing match was enjoined on the basis that it was disruptive of public order and a public nuisance. Sports such as boxing and cockfighting have been held, in disparate cases, to amount to a public nuisance because they are morally reprehensible

The fact that the Crown may act directly, at common law, for the redress of public grievances, for a public nuisance or for a purported public nuisance, is an intrinsic prerogative power and constitutional responsibility. The Executive Government's responsibility is separate from Parliament's constitutional function, in this instance. The Executive Government does not require Parliamentary intervention in an appropriate case of public nuisance. It is the Crown alone who can proceed *ex officio* or *ex relatione* at common law to seek an expedited response to abate an act which is inimical to the public, and a public nuisance, *per se*. The power of the Attorney-General, acting for the Crown, is a power vested in him as guardian of the public interest. It is in this way the common law offence of public nuisance, encompassing the *relator* and *ex officio* suits for public nuisance, is one of *constitutional* significance, intimately associated with the Executive Government's ancient pre-eminence.

#### 4. The right of the Crown to sue for damages for public nuisances

The focus of this thesis is directed to the responsibilities of the Crown to seek abatement of a public nuisance. Whilst it is not the focus of this thesis to detail the further actions which the Crown might take in regard to a public nuisance, note ought to be made of the Crown's right to sue for damages for a public nuisance, as a matter of law, in addition to the powers to indict or to sue for abatement of a public nuisance. See, for example, the recent decision of the Supreme Court of Canada in *British Columbia v Canadian Forest Products Ltd.*<sup>537</sup> In that case, a fire destroyed a forest.<sup>538</sup> The Attorney General did not resort to statutory remedies (as under s. 161(1) of the *Forest Act*, R.S.B.C. 1979, c. 140 (now R.S.B.C. 1996, c. 157), for payment where timber is damaged or destroyed), but sought damages at common law. The

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<sup>537</sup> [2004] SCC 38 at para [66], [2004] 2 SCR 74, (2004) 240 DLR(4th) 1.

<sup>538</sup> More particularly, a fire in the summer of 1992 near Stone Creek in the Prince George Forest District burned through 1,491 hectares of Crown forest land. The appellant Canadian Forest Products Ltd. (Canfor), a major logging licensee, was largely responsible for the blaze. The Crown suffered property damages and incurred expenses for activities undertaken to suppress the fire and restore the site. It commenced an action against Canfor for compensation in three categories: (1) expenditures for suppression of the fire and restoration of the burned-over areas; (2) loss of stumpage revenue from trees that would have been harvested in the ordinary course and (3) loss of trees set aside for various environmental reasons in sensitive areas as established by the Crown. The trial judge awarded the Crown \$3,575,000 under the first heading (which was an agreed figure) but otherwise dismissed the claim on the basis the Crown had failed to prove a compensable loss with respect either to harvestable or non-harvestable trees. The Crown appealed.

appeal raised the Attorney General's ability to recover damages for environmental loss as a public nuisance. The Crown in right of British Columbia sued not only in its capacity as property owner of the forest but as the representative of the people of British Columbia, for whom the Crown sought to maintain an unspoiled environment. The Supreme Court of Canada held, Justice Binnie speaking for the court, that there was no legal barrier to the Crown suing for compensation as well as injunctive relief in a proper case on account of public nuisance.<sup>539</sup> Further, the Crown's constitutional function as *parens patriae* afforded good reason for the existence of the right to sue private corporations for damages on behalf of the people.<sup>540</sup> See, also, *Department of Environmental Protection v Jersey Central Power and Light Co*,<sup>541</sup> where the *parens patriae* and 'public trust' doctrines led to a successful claim for monetary compensation in New Jersey, in the United States.<sup>542</sup> This point is raised, insofar as it might be relevant to sports, to highlight that the Crown may also be able to sue for damages when publicly owned sporting facilities, or public property generally, are damaged in the course of a sporting event, provided such damage is resultant upon a public nuisance.

In the context of publicly exhibited sports, where a public nuisance is committed on the basis of harm to the public right to safety, for example at a football match where violent or riotous behaviour occurs, there is no legal barrier to the Crown suing the sports association, administrator, or promoter of the public sport event for damages to recover compensation

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<sup>539</sup> [2004] SCC 38 at para [66]-[72] and para [81].

<sup>540</sup> *ibid* at paras [67]-[69] and [74]-[81]; and at para [158] (Bastarache, LeBel and Fish JJ dissenting). See also *The Queen v The Ship Sun Diamond* [1984] 1 FC 3 where the federal Canadian Crown sought damages in relation to cleanup costs it had incurred to mitigate damage from an oil spill in the waters off Vancouver. Damages were awarded for the cost of the water cleanup activities, in addition to costs to clean Crown-owned beach and foreshore property. Walsh J commented, "what was done was reasonable and appears to be a good example of the *parens patriae* principle with the Crown ... acting as what is referred to in civil law as 'bon pere de la famille'" (pp 31-32). In *Attorney General for Ontario v Fatehi* [1984] 2 SCR 536, the Province sought damages in relation to the cost of cleaning up a public highway following an accident. The Supreme Court of Canada held that Ontario was entitled to claim damages for harm to its property, like any other private property owner, and needed no statutory authority to bring such an action. Moreover, Estey J, writing for the Court, went on to cite at p 546 the following passage of Lord Dunedin in *Glasgow Corp v Barclay Curle & Co* (1923) 93 LJPC 1, with apparent approval: "That a person, who, by his action, did something which made the highway impassable, and so destroyed the use of that highway by others, could be interdicted at the instance of a road authority I do not doubt ... and although suits for damages in respect of such action may be sought for in vain in the books, I do not doubt that they would lie."

<sup>541</sup> 336 A2d 750 (1975).

<sup>542</sup> In this case the State sued a power plant operator for killing fish in tidal waters, caused by negligent pumping that caused a temperature variation in the fish habitat. The State sought compensatory damages for the damage to public resources. The court concluded that the State had the "right and fiduciary duty to seek damages for the destruction of wildlife which are part of the public trust" in "compensation for any diminution in that [public] trust corpus" [336 A2d 750 (1975) at p 759].

for damage to property owned by the State. Such property might include the stadium where the public sport event was staged; traffic signs and street signs; public bins; public trees, flowers, and plants; or any other public property which is damaged by riotous crowds attending the public sporting event. It is important to understand that it is not only the individuals who damage public property who are liable to prosecution. The organiser of the public sporting event can be sued by the State to recover compensation for damage caused by individual persons who attend at the event as spectators. The case of *R v Shorrock* clearly establishes that the owner of land where a public nuisance occurs, or organisers of events at which a public nuisance occurs, are liable for the actions of individual persons who attend the events where the public nuisance occurs.<sup>543</sup>

The Crown may also sue administrators or promoters of public sporting events where any environmental damage has occurred consequent to the staging of the public sporting event. If a sporting event is held at a beach, for example, and the event draws tens of thousands of spectators, the Crown can sue the organisers and promoters of such sporting event for damages if any part of the beach is left damaged. The types of damage to the beach could include littering, trampling of sand dunes, grasses and bushes in sand dune habitats, erosion, and any other type of harm to flora and fauna. Applying the decisions of *British Columbia v Canadian Forest Products Ltd*,<sup>544</sup> and *R v Shorrock*,<sup>545</sup> the organisers and promoters of public sporting events would be liable to pay compensation in damages pursuant to a public nuisance suit brought by the Crown.

## 5. The powers of local authorities to sue for public nuisance

In addition to the powers of the Executive to abate public nuisances, exercisable by the Attorney-General or a Minister of the Crown, a local authority may have power to sue for a public nuisance in its own name, pursuant to statute. The statutory power of a local authority to sue for abatement of a public nuisance is essentially a devolution of the

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<sup>543</sup> [1994] QB 279, [1993] 3 WLR 698, [1993] 3 All ER 917 (Court of Appeal).

<sup>544</sup> [2004] SCCD 1942.

<sup>545</sup> [1994] QB 279, [1993] 3 WLR 698, [1993] 3 All ER 917 (Court of Appeal).

Attorney-General's common law right, although the Crown retains their right to sue for abatement of a public nuisance as *parens patriae*. Speaking of section 222 of the Local Government Act 1972 (UK) which grants powers to local authorities to sue for abatement of a public nuisance, Lord Templeman noted in *Stoke-on-Trent City Council v B&Q (Retail) Ltd*: "Section 222 does not deprive the Attorney General of his power to enforce obedience to public law by proceedings ex officio or by relator action. Section 222 confers an additional power on a local authority which is charged with the administration of an area..."<sup>546</sup> Lord Templeman also drew attention to Viscount Dilhorne's comments in *Gouriet v Union of Post Office Workers*: "Viscount Dilhorne made the reservation with which no one quarrelled that: 'it is the law, and long established law, that save and in so far as the Local Government Act 1972, section 222, gives local authorities a limited power so to do, only the Attorney General can sue on behalf of the public for the purpose of preventing public wrongs...'"<sup>547</sup> Pursuant to such statutory power a local authority may, in the place of the Crown, assert the public right.<sup>548</sup> In England their powers exist pursuant to section 222 of the Local Government Act 1972 (UK);<sup>549</sup> see, *Nottingham City Council v Z (a minor)*.<sup>550</sup> In *Bathurst City Council v Saban (No*

<sup>546</sup> [1984] AC 754 at p 774 (House of Lords).

<sup>547</sup> *ibid* citing *Gouriet v Union of Post Office Workers* [1978] AC 435 (House of Lords) at p 494 (Viscount Dilhorne).

<sup>548</sup> Note further eg the comments of Lord Justice Keene in *Nottingham City Council v Z (a minor)* [2001] EWCA Civ 1248, [2002] 1 WLR 607 where His Lordship stated at paras [26]-[27]: "Where there is evidence of a public nuisance, it was historically always the case that the Attorney General could seek an injunction to restrain the nuisance and, before the passing of the Local Government Act 1972, a local authority could likewise sue in such cases, so long as it obtained the Attorney General's fiat: see *Prestatyn UDC v Prestatyn Raceway Ltd* [1969] 3 All ER 1573, [1970] 1 WLR 33. The effect of s 222(1) of the Local Government Act 1972 was to enable a local authority to sue in its own name in such cases where its local authority area was affected, without needing the consent of the Attorney General. It is asserting a public right. That was the conclusion reached, in my judgment rightly, by Oliver J, in *Solihull Metropolitan Borough Council v Maxfern Ltd* [1977] 1 WLR 127, [1977] 2 All ER 177 and approved in the *Stoke-on-Trent Council* case: [1984] 1 AC 754, [1984] 2 All ER 332 see p 773 H of the former report... The position therefore is that where a local authority... seeks by injunction to restrain a public nuisance, it may do so in its own name so long as it 'considers it expedient for the promotion or protection of the interests of the inhabitants' of its area (s. 222(1))... Whether it can establish that a public nuisance exists will, of course, depend on the facts of the individual case, but its entitlement to seek the injunction in its own name is clear. The court would then have to exercise its discretion, once a public nuisance was established, on the well-known principles applicable to such injunctions."

<sup>549</sup> Section 222 of the Local Government Act 1972 (UK) provides: '(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area - (a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name.'

<sup>550</sup> [2001] EWCA Civ 1248, [2002] 1 WLR 607. The appeal concerned the powers of a local authority to seek an injunction restraining the defendant from entering a housing estate in its area. The authority claimed that a lot of dealing in drugs was going on publicly on the estate and that the defendant was associating there with well known drug dealers and had himself been in possession of drugs and had been arrested on suspicion of dealing in drugs. The central question was whether a local authority had the power to bring proceedings in equity claiming injunctive relief. The Court of Appeal for England and Wales allowed the appeal by the Local Authority. Lord Justice Schiemann commented, at paragraph [13]: "In my judgment it is within the proper

2),<sup>551</sup> the Council of the City of Bathurst, in New South Wales, brought proceedings seeking an injunction to prevent the continuance of a public nuisance in the stead of the Attorney-General pursuant to the powers conferred on it by the former section 587 of the Local Government Act 1919 (NSW).<sup>552</sup> The New York Court of Appeals has determined that a municipal corporation has the capacity and is the proper party “to bring an action [at common law, as was the suit in the instant case] to restrain a public nuisance which allegedly has injured the health of its citizens.”<sup>553</sup> In *New York Trap Rock Corp v Town of Clarkstown*, the Court of Appeals in New York stated, somewhat dramatically, that “it is clear that a public nuisance which injures the health of the citizens of a municipality imperils the very existence of that municipality as a governmental unit.”<sup>554</sup> To the like effect, *City of New York v Beretta USA Corp*,<sup>555</sup> where the United States District Court held that: “The [City of New York] is a proper party to bring an action to restrain a public nuisance that allegedly may be injurious to the health and safety of its citizens.”<sup>556</sup>

In some common law jurisdictions local authorities now possess power to abate a public nuisance without recourse to legal proceedings to obtain an injunction. Note, for example,

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sphere of a local authority's activities to try and put an end to all public nuisances in its area provided always that it considers that it is expedient for the promotion or protection of the interests of the inhabitants of its area to do so in a particular case. Certainly my experience over the last 40 years tells me that authorities regularly do this and so far as I know this has never attracted adverse judicial comment. I consider that an authority would not be acting beyond its powers if it spent time and money in trying to persuade those who were creating a public nuisance to desist. Thus in my judgment the County Council in *PYA [Attorney-General v PYA Quarries Ltd]* [1957] 2 QB 169] was not acting beyond its powers in seeking the Attorney General's fiat in trying to put a stop to the nuisance by dust in that case and thus exposing itself to potential liability in costs. It follows that, provided that an authority considers it expedient for the promotion and protection of the interests of the inhabitants of its area, [as prescribed by section 222 of the Local Government Act 1972 (UK)] it can institute proceedings in its own name with a view to putting a stop to a public nuisance.”

<sup>551</sup> (1986) 58 LGRA 201, BC8601183 (Supreme Court of New South Wales).

<sup>552</sup> Although s 587 Local Government Act 1919 (NSW) permitted the Council to sue in some cases of public nuisance, it did not, pursuant to the powers given to it under that section, have standing in all cases of public nuisance: see *Farley and Lewers Ltd v Attorney-General* (1962) 63 SR (NSW) 814. The present power of local councils viz. public nuisances is contained in section 125 Local Government Act 1993 (NSW).

<sup>553</sup> *New York Trap Rock Corp v Town of Clarkstown* 299 NY 77, 85 NE 2d 873 (1949) at p 83 of the former report.

<sup>554</sup> *ibid* at p 84 of the former report.

<sup>555</sup> 315 F Supp 2d 256 (2004).

<sup>556</sup> 315 F Supp 2d 256 at p 276-77. In *City of New York v Beretta USA Corp*, the United States District Court, at p 273, held that: “Precluding the City from bringing suit aimed at redressing the problem of gun-related violence would interfere with the authority accorded it under New York's home rule provisions. Consistent with Article IX of the state constitution, the City has the authority to take action on issues of local concern including those affecting the safety, health and well-being of its inhabitants. See N.Y. Const. art. IX, § 2(c)...”

section 125 of the Local Government Act 1993 (NSW),<sup>557</sup> sections 199 to 204 of the Local Government Act 1993 (Tas), and section 725 of the Local Government Act RSBC 1996 c. 323.<sup>558</sup>

The use of abatement suits by local authorities, as a distinct remedy from the *ex officio* and relator action of the Attorney-General to abate a public nuisance, has drawn the need for caution. In *Nottingham City Council v Z (a minor)*.<sup>559</sup>, Lord Justice Schiemann sounded a warning against the excessive use of *ex officio* suits for abatement of public nuisances by local authorities, stating, at paragraph 22: “Even where an authority is empowered to take proceedings for an injunction in aid of the criminal law, it must bear in mind that there are many arguments against authorities applying for and the courts making injunctions in such cases and caution has repeatedly been enjoined when it is sought to use the civil law in support of the criminal law. As Lord Templeman said in the *Stoke-on-Trent* case [1984] 1 AC 754, [1984] 2 All ER 332 at p 775 of the former report: ‘Section 222 requires that a local authority shall only act if they ‘consider it expedient for the promotion or protection of the interests of the inhabitants of their area’. Any exercise by the local authority of this statutory power is subject to the control of judicial review... Where the local authority seeks an injunction, the court will consider whether the power was rightly exercised and whether, in all the circumstances at the date the application for an injunction is considered by the court, the equitable and discretionary remedy of an injunction should be granted.’” To the like effect, we might assume that the powers of local authorities granted by legislation in other common law jurisdictions is subject to judicial review.<sup>560</sup>

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<sup>557</sup> Section 125 Local Government Act 1993 (NSW) reads: “Abatement of Public Nuisances. A council may abate a public nuisance or order a person responsible for a public nuisance to abate it.” The Act defines the terms ‘abatement’ and ‘nuisance’ in the following fashion: “Note. Abatement means the summary removal or remedying of a nuisance (the physical removal or suppression of a nuisance) by an injured party without having recourse to legal proceedings. Nuisance consists of interference with the enjoyment of public or private rights in a variety of ways. A nuisance is “public” if it materially affects the reasonable comfort and convenience of a sufficient class of people to constitute the public or a section of the public. For example, any wrongful or negligent act or omission in a public road that interferes with the full, safe and convenient use by the public of their right of passage is a public nuisance.”

<sup>558</sup> Section 725 provides: “(1) If a regional district provides a service referred to in section 797.1 (1) (d), the board may, by bylaw, do one or more of the following: (a) prevent, abate and prohibit nuisances, and provide for the recovery of the cost of abatement of nuisances from the person causing the nuisance or other persons described in the bylaw...”

<sup>559</sup> [2001] EWCA Civ 1248, [2002] 1 WLR 607.

<sup>560</sup> Research has failed to yield case law, as of 2009, of judicial review of the summary power of local authorities in other common law jurisdictions to abate a public nuisance.



The instituting of public nuisance abatement proceedings against sports federations or the owners, managers, or operators of sports arenas, by diverse local authorities in diverse locations, may result in some sporting activities, or some acts concomitant with sport, being lawful in one local shire or council, whilst unlawful in another. There is nothing problematic in this, per se; particularly so where some sports events are conducted in very close proximity to residential areas, whilst others are conducted in more industrial or rural areas. A sport must be conducted according to the sensibilities of the locale wherein it is practised. It may very well come to pass that the residents of Wimbledon become tired of the very long queue stretching down Church Road from the gates of the Wimbledon tennis centre toward Southfields in June and July of every year. The appropriation of the footpath by hopeful attendees to the tennis tournament, desirous of a ticket, with such persons camped on the footpath, and often sleeping overnight, or over a number of days, eating, and staking out their place in the queue, on the public footpath, over a considerable number of hours and days, may amount to a public nuisance being an obstruction to the highway or an inconvenience to the public in the exercise of a public right to use of the highway. The queue appears to be one continuous BBQ, with many of the tents draped with national flags, and cannot be hygienic on a sultry summer's day. In 2002, 9,000 people desirous of a ticket camped out in Wimbledon Park; and in 2009, over 2000 people camped overnight.<sup>561</sup> The existence of queues in other circumstances have been held to be a public nuisance.<sup>562</sup> That the operation of sports events must conform to the sensibilities of the locale where it is

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<sup>561</sup> H Arkell and S Bhatia 'Wimbledon Limits Seats for People's Saturday' *Evening Standard* (London United Kingdom 19 June 2003) <<http://www.thisislondon.com/sport/wimbledon/articles/5401063%3Fsource%3DEvening%2520Standard>> (18 May 2005). M Townsend and E Ferguson 'Heatwave Forecast Triggers the First UK Alert Over Health Fears' *The Guardian* (London United Kingdom 27 June 2009) <<http://www.guardian.co.uk/uk/2009/jun/27/heatwave-forecast-met-office>> (28 June 2009)

<sup>562</sup> See eg *Lyons Sons & Co v Gulliver* [1914] 1 Ch 631 at p 642 (Cozens-Hardy MR), where His Honour states: "...a man is or may be liable to an indictment for attracting, even by something lawfully done on his own premises, a crowd in the street adjoining his premises." Cozens-Hardy also noted, at p 639: "Then it is said by or on behalf of the defendants, 'But we are not responsible for what goes on in the streets, it is the duty of the police to keep the streets clear, and if they do not do that, make a complaint to the police, do not attack us for collecting this crowd; we do not want them there; we only invite them to come in at the time when the doors are open, and when they are willing to pay their sixpences, and it is altogether unreasonable that we should be attacked because this number of people chooses, without any invitation from us, permanently to obstruct the roadway and the pathway, one or other or both, for a considerable period of time.' Now is that the law? In my view it is not."

practised is supported by the decisions of *Bellamy v Wells*,<sup>563</sup> where boxing matches held in a club in a residential area attracted boisterous crowds who disturbed the sleep of the residents, and *British Columbia (Attorney General) v Haney Speedways Ltd*,<sup>564</sup> where the activities of a motorcar racing speedway disturbed local residents.

## 6. Concluding remarks

With respect to public nuisance and its application to sport, the powers of the Executive branch of government are extensive. The Executive may prosecute a sports federation, or the promoter or organiser of a sporting event, or may prosecute the owner or occupier of a sports facility or ground at which a public nuisance occurs, in jurisdictions where the common law offence of public nuisance has not been codified in a criminal code. In lieu of prosecution, the Attorney-General may prefer to sue for injunctive relief. Suing for abatement of a public nuisance is the more common and usual method to remedy a public nuisance. The Executive may quickly bring civil suit for injunctive relief either on relator action of aggrieved residents or persons affected by the public nuisance, or *ex officio*, against a sports federation, or the promoter or organiser of a sporting event, or the owner or occupier of a sports facility or ground. Further, the Executive may seek and obtain damages against these same persons.

The injunctive remedy for a public nuisance is not directed to punishment of any individual person, whether they be an athlete or a fan attending a sporting event. This is an important qualification, signalling the uniqueness of the equitable remedy for a public nuisance. Sports federations, as private enterprises or private entities, albeit promoting and managing a public cultural endeavour, risk sanction of their sporting activity if their sporting activity is conducted in such a way as to amount to a public nuisance, or is conducted such that acts concomitant with the playing of a sporting activity, such as violent, riotous or boisterous behaviour by crowds attending the sport, or by players participating in the sport, amount to a public nuisance. These sports federations operate their sports in “peril of punishment if they

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<sup>563</sup> (1890) 60 LJ Rep Ch NS 156.

<sup>564</sup> [1963] 39 DLR(2d) 48 (British Columbia Supreme Court).

failed to take proper precautions to prevent the detriment from occurring.”<sup>565</sup> Proper precautions may include restricting the number of games played within any competition, scheduling games at times to cause as little or no inconvenience to local communities wherein such sport is practised, restricting the distribution of alcohol to attendant crowds, restricting the use of music, or fireworks, or ceasing games between particular clubs altogether. The purpose of the Crown’s powers under public nuisance is to protect and preserve public rights. The Crown has legitimate authority to require of sports federations, administrators, stadium operators, and professional athletes, that they conduct themselves and their sport events in such a manner as to minimize as much as practicable any impingement of public rights.

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<sup>565</sup> *Pregelj and Wurramura v Manison* [1987] NTSC 76 at para [31] (Nader J, obiter), (1987) 51 NTR 1.

## Chapter 9

### The modern utility of public nuisance

#### 1. Criticisms of public nuisance

Public nuisance has been variously described in pedagogical writing as “immersed in undefined uncertainty”,<sup>566</sup> and as “vague and infinitely extensible” and incongruous with modern notions of certainty and precision in law.<sup>567</sup> Although Courts have roundly rejected these criticisms,<sup>568</sup> such criticisms remain cogent and have their basis in the famous polemic *Truth versus Ashurst*, written in 1792 and published in 1823 by Jeremy Bentham, and remain persuasive. Bentham made a searing criticism of judge-made criminal law, which he called ‘dog-law’:

“It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won’t tell a man beforehand what it is he *should not do* - they won’t so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it.”

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<sup>566</sup> See Professor Newark who wrote in his paper ‘The Boundaries of Nuisance’: “...the truest dictum in the books is that of Erle CJ when he said that the answer to the question, What is a nuisance? is ‘immersed in undefined uncertainty’.” (1949) 65 LQR 480 at p 480.

<sup>567</sup> JR Spencer ‘Public Nuisance – A Critical Examination’ (1989) CLJ 55 at pp 55 and 83.

<sup>568</sup> *R v Rimmington, R v Goldstein* [2005] UKHL 63 at para [36], [2006] 1 AC 459, [2005] 3 WLR 982 (Lord Bingham of Cornhill); *Attorney-General of Ontario v Dieleman* [1994] 20 OR (3d) 229 at p 269; *Attorney-General of British Columbia v Conillard* [1984] 11 DLR(4th) 567, 14 CCC (3d) 169 (McEachern CJSC).

Courts have accepted that vagueness in the definition of a law can warrant its being declared void. In *Grayned v City of Rockford*, the United States Supreme Court identified “a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vagueness offends several important values... A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”<sup>569</sup> Further, in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG*, Lord Diplock commented that: “The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.”<sup>570</sup> And in *R v Misra and Srivastava*, Judge LJ observed that: “Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime any conviction for it would be unsafe. That said, however, the requirement is for sufficient rather than absolute certainty.”<sup>571</sup>

In the 17th century Bacon proclaimed the essential link between justice and legal certainty:

“For if the trumpet give an uncertain sound, who shall prepare himself to the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes ... Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known and certain law... Nor should a man be deprived of his life, who did not first know that he was risking it.”<sup>572</sup>

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<sup>569</sup> 408 US 104 (1972). Lord Phillips MR approved this dicta in *R (L and another) v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 WLR 1230, para [25].

<sup>570</sup> [1975] UKHL 2, [1975] AC 591 at p 638, [1975] 2 WLR 513 (House of Lords).

<sup>571</sup> [2004] EWCA Crim 2375 at para [34], [2005] 1 Cr App R 328 (Judge LJ).

<sup>572</sup> Quoted in DR Coquillette *Francis Bacon* (Edinburgh University Press Edinburgh 1992) at pp 244 and 248, from Aphorism 8 and Aphorism 39—A Treatise on Universal Justice; quoted in *R v Misra and Srivastava* [2004] EWCA Crim 2375 at para [32], [2005] 1 Cr App R 328 (Judge LJ); approved and followed in *R v Rimmington*, *R v Goldstein* [2005] UKHL 63 at para [33], [2006] 1 AC 459, [2005] 3 WLR 982 (Lord Bingham of Cornhill).

The principal criticism of public nuisance – that it is vague and uncertain – was raised in trenchant argument by appellant Counsel before the House of Lords in the leading case of *R v Rimmington, R v Goldstein*.<sup>573</sup> The appellants submitted that the crime of causing a public nuisance, as currently interpreted and applied, lacked the precision and clarity of definition, and the certainty and the predictability necessary to meet the requirements of either the common law itself or article 7 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 (as set out in Schedule 1 to the Human Rights Act 1998 (UK)).<sup>574</sup> It was also argued that the courts could not apply the offence of public nuisance to the facts in *Rimmington* because the courts would be creating a new offence. On this latter point, specifically, the appellants contended (1) that conduct formerly chargeable as the crime of public nuisance had now become the subject of express statutory provision, (2) that where conduct was the subject of express statutory provision it should be charged under the appropriate statutory provision and not as public nuisance, and (3) that accordingly the crime of public nuisance had ceased to have any practical application or legal existence. The appellants relied on the House of Lords decision in *R v Withers* where it was declared that the judges have no power to create new offences.<sup>575</sup> Nor may the courts nowadays widen existing offences so as to make punishable conduct of a type hitherto not subject to punishment.<sup>576</sup>

In meeting these arguments Lord Bingham adopted the comments of Judge LJ for the Court of Appeal (Criminal Division) in *R v Misra and Srivastava*,<sup>577</sup> and His Lordship then concluded: “There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. If the ambit of a common law offence is to be enlarged,

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<sup>573</sup> [2005] UKHL 63 at para [28] et seq, [2006] 1 AC 459, [2005] 3 WLR 982, [2006] 2 All ER 257.

<sup>574</sup> Article 7(1) of the Convention provides that: “No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

<sup>575</sup> [1975] AC 842 (House of Lords) at p 854G (Lord Reid), at p 860E (Viscount Dilhorne), at pp 863D and 867E (Lord Simon of Glaisdale), and at p 877 (Lord Kilbrandon).

<sup>576</sup> *ibid* at p 863D (Lord Simon of Glaisdale).

<sup>577</sup> [2004] EWCA Crim 2375 at paras [29]-[34], [2005] 1 Cr App R 328.

it ‘must be done step by step on a case by case basis and not with one large leap’: *R v Clark (Mark)* [2003] EWCA Crim 991, [2003] 2 Cr App R 363 at para [13].<sup>578</sup>

At paragraph 36, Lord Bingham continued:

“How, then, does the crime of causing a public nuisance, as currently interpreted and applied, measure up to these standards?... I would for my part accept that the offence [of public nuisance] as defined by Stephen, as defined in *Archbold* (save for the reference to morals), as enacted in the Commonwealth codes quoted above, and as applied in the cases... is clear, precise, adequately defined and based on a discernible rational principle. A legal adviser asked to give his opinion in advance would ascertain whether the act or omission contemplated was likely to inflict significant injury on a substantial section of the public exercising their ordinary rights as such: if so, an obvious risk of causing a public nuisance would be apparent; if not, not.”

The House of Lords in *Rimmington* affirmed the Court of Appeal’s earlier holding that the offence was sufficiently precise to preclude breach of Article 7 of the *European Convention*.<sup>579</sup> Nor was the offence of public nuisance capable of amounting to a breach of Articles 8 or 10 of the *European Convention*.<sup>580</sup> A long series of consistent precedents provided clear authority,

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<sup>578</sup> *R v Rimmington, R v Goldstein* [2005] UKHL 63 at para [33], [2006] 1 AC 459, [2005] 3 WLR 982 (Lord Bingham of Cornhill).

<sup>579</sup> [2005] UKHL 63 at paras [34]-[36], [2006] 1 AC 459, [2005] 3 WLR 982 (Lord Bingham of Cornhill); *R v Goldstein, R v R* [2003] EWCA 3450, [2004] 1 WLR 2878, [2004] 2 All ER 589 (Court of Appeal). With reference to Article 7 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 (as set out in Schedule 1 to the Human Rights Act 1998 (UK)), the Court of Appeal’s view was that the elements of the offence of causing a public nuisance were sufficiently clear to enable a person, with appropriate legal advice if necessary, to regulate his behaviour. “All that is required is a reasonable degree of foreseeability of the consequences which action or conduct may entail. The indictments in the present cases do no more than seek to apply the elements of the offence to the particular facts; and it is for the jury, appropriately directed, to determine whether or not the charges are made out. A citizen, appropriately advised, could foresee that the conduct identified was capable of amounting to a public nuisance.” (Latham LJ, at para [17]).

<sup>580</sup> *ibid.* Concerning Articles 8 and 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 (as set out in Schedule 1 to the Human Rights Act 1998 (UK)), Lord Justice Latham in the Court of Appeal stated, at paragraph 25, “...the offence of causing a public nuisance is a proper and proportionate response to the need to protect the public from acts, or omissions, which substantially interfere with the comfort and convenience of the public as being taken in the interests of public safety, for the prevention of disorder, for the protection of health and morals, and in particular the need to protect the rights of others. The level of imprecision inherent in the offence is necessary to enable it to be applied flexibly to meet new

by which a court is bound, for the continued existence of the offence of public nuisance at common law, as defined in the current edition of *Archbold*.<sup>581</sup> Lord Bingham accepted that courts have no power to create new offences, but also declared that they have no power to abolish existing offences. Only Parliament may undertake the task of abolishing public nuisance, following careful consideration as to whether there are aspects of the public interest which the crime of public nuisance has a continuing role to protect.<sup>582</sup> Though His Lordship accepted that the circumstances in which, in future, there can properly be resort to the common law crime of public nuisance will be relatively rare, he concluded that it was not open to the House of Lords to declare that the common law crime of causing a public nuisance no longer existed.<sup>583</sup>

The *Rimmington* decision is essentially a pruning exercise by the House of Lords; an exercise which restates the definition of public nuisance in clear terms and refines and strengthens the application of public nuisance to those factual circumstances to which it applies. The House of Lords held in *Rimmington* that several earlier cases had been wrongly decided by the Court of Appeal during the decades of the 1970s and 1980s and that, as a result, the offence of public nuisance had become less clear because public nuisance had been extended to cover a new class of cases which it was not defined to include. These cases were the criminal *telephone call cases* (such as *R v Norbury* [1978] Crim LR 435 and *R v Johnson (Anthony)* [1997] 1 WLR 367) where convictions had been upheld against persons perpetrating nuisance and harassing telephone calls. *Rimmington* decides that the *telephone call cases* were wrongly decided and that the offence of public nuisance does not encompass acts where there exists individual victims of behaviour in contradistinction to the public generally.

The House of Lords in *Rimmington* meets the criticism that the common law offence of public nuisance is vague and indiscriminate in its application by agreeing with the criticism in

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situations. We therefore reject the argument that the offence is capable of amounting to a breach of arts 8 or 10.”

<sup>581</sup> [2005] UKHL 63 at para [36], [2006] 1 AC 459, [2005] 3 WLR 982 (Lord Bingham of Cornhill); [2003] EWCA 3450 at para [12], [2004] 1 WLR 2878 at p 2883, [2004] 2 All ER 589 (Lord Justice Latham); following *R v White and Ward* (1757) 1 Burr 333; *R v Moore* (1832) 3 B&Ad 184; *R v Medley* (1834) 6 C&P 292; *R v Henson* (1852) Dears 24, 169 ER 621; *R v Stephens* (1866) LR 1 QB 702; *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169; *R v Madden* [1975] 3 All ER 155; *R v Shorrock* [1994] QB 279, [1993] 3 WLR 698, [1993] 3 All ER 917 (Court of Appeal); *R v Johnson* [1996] 2 Cr App R 434.

<sup>582</sup> *ibid* at para [31].

<sup>583</sup> *ibid* at para [31] (Lord Bingham of Cornhill).



one respect and by laying down certain precedent that refines and clarifies the circumstances in which the offence is applicable. The House confirmed that the errors of the Court of Appeal for England and Wales, over several decades, in applying the common law offence of public nuisance to the perpetrators of nuisance telephone calls had confused the definition of public nuisance, contradicted its rationale, perverted its nature, and changed the essential constituent elements of the offence.<sup>584</sup> Mr Rimmington's and Mr Goldstein's convictions were quashed because the House of Lords held that the public nuisance offence could not be applied to them on the facts of their cases.<sup>585</sup> The facts alleged against each man did not cause common injury to a section of the public and so lacked the essential ingredient of common nuisance, whatever other offence they may have constituted.

The judgment affirms that, although the offence of public nuisance is clearly defined, public nuisance is an offence which can be incorrectly applied to factual circumstances to which it does not relate or in respect of which it can have no lawful application. In such instances, confusion, vagueness and uncertainty as to the proper meaning and interpretation of the offence can be exacerbated.

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<sup>584</sup> *R v Rimmington, R v Goldstein* [2005] UKHL 63 at para [37], [2006] 1 AC 459, [2005] 3 WLR 982 (Lord Bingham of Cornhill)

<sup>585</sup> *R v Rimmington, R v Goldstein* [2005] UKHL 63, [2006] 1 AC 459, [2005] 3 WLR 982 was the appeal to the House of Lords from the Court of Appeal decision affirming their convictions for public nuisance ([2003] EWCA Crim 3450, [2004] 1 WLR 2878 (Court of Appeal)). The appeals were upheld and convictions quashed. In two otherwise unrelated cases, the defendants had been indicted for the common law offence of causing a public nuisance. In Goldstein's case, the defendant was convicted of causing a public nuisance by sending through the post, at the height of a security alert, an envelope containing salt which had leaked out at the sorting office of Royal Mail, causing the evacuation of postal workers and the attendance of specialist police officers to determine whether the salt was anthrax. In Rimmington's case, on a preparatory hearing, the judge made an adverse ruling against the defendant who faced an indictment of having caused a nuisance to the public by sending through the post, over a nine-year period, several hundred packages containing racially offensive material. On their conjoined appeals to the Court of Appeal, the defendants argued that the definition of the offence of public nuisance was so vague and uncertain in its scope that it should no longer be recognised at common law. Alternatively, they submitted that the offence of public nuisance infringed the principle of legal certainty enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act 1998 (UK)) because it was not formulated with sufficient precision to enable a citizen to regulate his conduct. The defendants further argued that the offence was capable of resulting in a breach of Articles 8 and 10 of the convention (the right to respect for private life and the right to freedom of expression respectively) because it was not necessary in a democratic society to meet a pressing social need of the sort identified in each of those provisions.

## 2. Clarity in the application of public nuisance

The circumstances of the *Rimmington* appeal demonstrate that the predominant issue in a suit for public nuisance is one of interpretation.<sup>586</sup> The challenge for a court is to properly interpret public nuisance by applying the definition of public nuisance only to those factual circumstances which warrant its application. Courts must interpret and apply public nuisance with clarity and precision or otherwise they will “contradict the rationale of the offence and pervert its nature”.<sup>587</sup>

The House of Lords reaffirms in *Rimmington* that the offence of public nuisance must result in common injury, and not injury directed to individuals alone, as detailed by the long line of precedents on public nuisance.<sup>588</sup> Lord Bingham of Cornhill, speaking for the House, affirms and follows a long line of precedents in his judgment and in so doing reaffirms the clarity and particularity of the offence of public nuisance. Indeed, “the use of precedent [is] an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.”<sup>589</sup> Lord Bingham also firmly criticised earlier Court of Appeal judgments for their imprecise and unclear interpretation and application of the offence of public nuisance and their failure to adhere to precedents. The circumstances in which the offence of public nuisance might apply had become confused and the courts had lost their way because some judges were lax in interpreting precedents and applying the fundamental principle of common injury in public nuisance caselaw.<sup>590</sup> The offence of public nuisance “was cut adrift

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<sup>586</sup> *ibid* at para [37] (Lord Bingham of Cornhill).

<sup>587</sup> *ibid*.

<sup>588</sup> Citing the early writings of Hawkins and Blackstone, United Kingdom and Commonwealth caselaw, as well as Commonwealth statutes codifying the common law offence of public nuisance, Lord Bingham of Cornhill states: “All of the foregoing definitions, as I read them, treat the requirement of common injury as a, perhaps *the*, distinguishing feature of this offence.” (*ibid* at para [12]).

<sup>589</sup> *Practice Statement (Judicial Precedent)* (1986) 83 Cr App R 191, [1966] 1 WLR 1234 (Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on July 26, 1966); approved and followed in *R v Misra and Srivastava* [2004] EWCA Crim 2375 at para [33]; [2005] 1 Cr App R 328 (Judge LJ); approved and followed in *R v Rimmington*, *R v Goldstein* [2005] UKHL 63 at para [33], [2006] 1 AC 459, [2006] 3 WLR 982 (Lord Bingham of Cornhill).

<sup>590</sup> *R v Rimmington*, *R v Goldstein* [2005] UKHL 63 at paras [37]-[38], [2006] 1 AC 459, [2006] 3 WLR 982 (Lord Bingham of Cornhill). His Lordship stated, “To permit a conviction of causing a public nuisance to rest on an injury caused to separate individuals rather than on an injury suffered by the community or a significant section

from its intellectual moorings”.<sup>591</sup> These judges, referenced by the House of Lords in *Rimmington*, had perverted the definition of public nuisance because they had applied the offence to new circumstances without trenchant clarity and had extended the application of public nuisance principles to a new category of actions where there were a large number of separate individual victims rather than common injury, contrary to precedent.

There is, perhaps, a warning for us in this judgment; a warning that we must be clear and precise when discussing those factual circumstances we argue amount to a public nuisance. This is important to bear in mind when considering the applicability of the offence of public nuisance to publicly exhibited sporting events. Only where the circumstances of sporting events staged at public places contain a common injury for the public can a public nuisance be said to be found. A lack of assiduity in applying the offence of public nuisance to human circumstances does not mean that the offence itself is imprecise. All it means is that we are not being careful enough lawyers, like those judges of the Court of Appeal for England and Wales who Lord Bingham criticised.

Though it has been argued that public nuisance ought to be abolished because “everything in public nuisance runs contrary to modern notions of certainty and precision in criminal law,”<sup>592</sup> the offence remains one at common law, and, a useful one, too, provided that we make use of it conscientiously, alert to the critical element of common injury so as to enable the offence to be applied to relevant factual circumstances.

The offence of public nuisance is necessarily broad so as to encompass many types of behaviour inimical to the public for whom and by whom the common law subsists. If offending acts do, indeed, cause common injury by endangering the life, health, property, or the comfort of the public, or by obstructing the public in the exercise or enjoyment of rights common to all, then a public nuisance is committed. This is so even though the particular acts may be novel or unprecedented, such as a newly invented sport, or even where a newly or recently professionalised sport desiring to maximize monetary profit and media exposure

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of it as a whole was to contradict the rationale of the offence and pervert its nature, in Convention terms to change the essential constituent elements of the offence to the detriment of the accused.”

<sup>591</sup> *ibid.*

<sup>592</sup> JR Spencer ‘Public Nuisance – A Critical Examination’ (1989) CLJ 55 at p 83.

conducts itself in such a way that is inconsiderate of public rights. The key factor to consider is the existence of common injury. Precedents will assist in providing a point of reference to those circumstances where common injury may exist.

The common law offence of public nuisance is not ill defined. Common law offences are necessarily flexible. The question as to whether particular acts amount to a public nuisance, for example, is always a question of fact.<sup>593</sup> The application of public nuisance to modern sports activities provides the Executive Government, or a local authority where such local authority is empowered by statute, with an appropriate remedy against the excesses of sporting activity in order to protect and preserve public rights. The existence of such a remedy is constructive and invaluable in a sports market now dominated by profit motive and desire for maximum media exposure and advertising revenue. Common law public nuisance exists to protect the public's common interests from unfettered impingement in an unregulated environment. The methodology for the application of the law of public nuisance to sport is the same as that for any aspect of the common law, proceeding through the assiduous application of a general principle to the factual circumstances of the case at bar. The words of Lord Simon of Glaisdale in *Kneller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* are apposite:

“...the common law proceeds generally by distilling from a particular case the legal principle on which it is decided, and that legal principle is then *generally* applied to the circumstances of other cases to which the principle is relevant as they arise before the courts. As Parke J said, giving the advice of the judges to your Lordships' House in *Mirehouse v Rennell* (1833) 1 Cl & Fin 527 at 546: ‘Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable or inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been

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<sup>593</sup> *R v White and Ward* (1757) 1 Burr 333 at p 337, 97 ER 338; *New York Trap Rock Corp* 85 NE 2d (1948) at p 875; *Hoover v Durkee* 212 AD 2d 839 (1995) at p 840.

judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.”<sup>594</sup>

As is shown in Part 3 of this thesis, below, publicly exhibited sporting events have created and do create public nuisances. We are not at liberty to reject this fact. But we may desire a new legislative framework to manage these activities, in preference to reliance on common law rules and judicial reasoning to obtain a remedy.

### 3. The effect of codification on the common law offence of public nuisance

A further criticism of the offence of public nuisance is that it has no application in the modern juridical system because of the effect of codification. In the *Rimmington* appeal before the House of Lords, the appellants contended that the crime of public nuisance had ceased to have any practical application or legal existence because conduct that was formerly chargeable as the crime of public nuisance had now become the subject of express statutory provision, such as those acts or omissions referenced in section 79(1) of the Environmental Protection Act 1990 (UK), in section 137 of the Highways Act 1980 (UK) or in section 1 of the Protection from Harassment Act 1997 (UK).<sup>595</sup> What of the utility of the common law offence of public nuisance in an age of codification?

The common law offence of public nuisance may be codified as a criminal offence by Criminal Codes or Penal Laws. For example, pursuant to section 230 Criminal Code Act 1899 (Qld) in Queensland;<sup>596</sup> and section 180(1) Criminal Code, R.S.C. 1985, c. C-46, in

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<sup>594</sup> [1973] AC 435 at p 492, [1972] 2 All ER 898 (House of Lords). *Mirehouse v Rennell* (1833) 1 Cl & Fin 527 at 546 (Parke) was cited with approval in *Shaw's* case [1961] 2 All ER at 465, [1962] AC at 289 by Lord Tucker, Lord Simonds [1961] 2 All ER at 448, [1962] AC at 261 and Lord Morris of Borth-y-Gest [1961] 2 All ER at 467, [1962] AC at 291 concurring, and by Lord Hodson [1961] 2 All ER at 468, [1962] AC at 292, 293.

<sup>595</sup> *R v Rimmington*, *R v Goldstein* [2005] UKHL 63 at para [28] et seq, [2006] 1 AC 459, [2005] 3 WLR 982, [2006] 2 All ER 257. See nn 289-94, below, and accompanying text.

<sup>596</sup> Section 230 Criminal Code Act 1899 (Qld) in effect amounts to a faithful replication of the common law definition of public nuisance. Section 230 provides:

“230. Any person who—

(a) without lawful justification or excuse, the proof of which lies on the person, does any act, or omits to do any act with respect to any property under his control, by which act or omission danger is caused to the lives, safety, or health, of the public; or

Canada,<sup>597</sup> and section 370 of the California Penal Code,<sup>598</sup> public nuisance is now a statutory criminal offence, not a common law offence. And even where the common law offence of public nuisance has not itself been codified, parliamentary legislation may declare certain acts or certain omissions to be public nuisances, such as actions causing environmental harm.<sup>599</sup>

Judicial comments on the effects of these movements toward codification provide guidance on the modern utility of the offence of public nuisance. Where the common law offence of public nuisance has been codified as a statutory offence under a criminal code or under environmental legislation, road or transport legislation, or public order legislation, for example, the Crown may now only institute criminal proceedings against an offender under the provisions of such legislation. Examples of such codification, detailed by the Court of Appeal for England and Wales in *R v Goldstein, R v R*,<sup>600</sup> include the several statutory enactments and amendments of recent years in the UK where new offences have been created to cover acts or omissions previously the subject of the common law offence of public nuisance; for example: section 79(1) of the Environmental Protection Act 1990

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(b) without lawful justification or excuse, the proof of which lies on the person, does any act, or omits to do any act with respect to any property under the person's control, by which act or omission danger is caused to the property or comfort of the public, or the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects, and by which injury is caused to the person of some person; is guilty of a misdemeanour, and is liable to imprisonment for 2 years."

<sup>597</sup> Under the title 'Common Nuisance' section 180 Criminal Code, RSC c. C-46 provides:

"180. (1) Every one who commits a common nuisance and thereby

(a) endangers the lives, safety or health of the public, or

(b) causes physical injury to any person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby

(a) endangers the lives, safety, health, property or comfort of the public; or

(b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada."

<sup>598</sup> Cal Pen Code s 370 (2005) provides: "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighbourhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance."

<sup>599</sup> See eg n 601, below, and accompanying text. And see c 720, s 47-5 of the Illinois Compiled Statutes (720 ILCS 5/47-5 (2005)) which declares numerous acts and omissions to be a public nuisance; s 79 Environmental Protection Act 1990 (UK) which declares certain acts to be "statutory nuisances"; and s 77 Health Act 1937 (Qld) declares designated acts to be nuisances. Note, also, s 400.05(1) Penal Law New York, which declares the unlawful possession, manufacture, transportation or disposition of any weapon, instrument, appliance or substance specified in article 265, or when utilized in the commission of an offence, a nuisance.

<sup>600</sup> [2003] EWCA Crim 3450, [2004] 1 WLR 2878 (CA), [2004] 2 All ER 589 (CA). *R v Goldstein, R v R* was appealed to the House of Lords in *R v Rimmington, R v Goldstein* [2005] UKHL 63, [2006] 1 AC 459, [2005] 3 WLR 982.

(UK);<sup>601</sup> section 85 of the Water Resources Act 1991 (UK);<sup>602</sup> section 137 of the Highways Act 1980 (UK);<sup>603</sup> section 1 of the Protection from Harassment Act 1997 (UK);<sup>604</sup> section 63 of the Criminal Justice and Public Order Act 1994 (UK);<sup>605</sup> and section 85 of the Postal Services Act 2000 (UK).<sup>606</sup> However, the separate remedy of civil suit for abatement of a public nuisance at common law remains and is not affected by codification of the offence of public nuisance as a statutory criminal offence. This is so, principally, because at common law the two remedies available for the redress of a public nuisance offence, on the one hand criminal prosecution and on the other hand civil suit for abatement, were regarded by the judges as two distinct and separate procedures and separate remedies.<sup>607</sup> In his seminal critique of common law public nuisance, JR Spencer writes that the remedy of injunction to abate a public nuisance was first instituted in Chancery and not before the criminal jurisdiction of the King's Bench as a preliminary proceeding to a criminal trial – *Baines v Baker* (1752) Amb 158, 27 ER 105; *Attorney General v Cleaver* (1811) 18 Ves Jun 212, 34 ER 297; and *Attorney General v Johnson* (1819) 2 Wils Ch 87, 37 ER 240.<sup>608</sup> And once the possibility of an injunction had been established, injunctions and relator actions rapidly became popular in public nuisance cases. A long line of actions followed throughout the

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<sup>601</sup> Section 79(1) of the Environmental Protection Act 1990 (UK) as amended, establishes nine categories of statutory nuisance (the state of premises, smoke emissions, fumes or gases from dwellings, effluvia from industrial trade or business premises, accumulations or deposits, animals, noise from premises, noise from vehicles or equipment in a street and other matters declared by other Acts to be statutory nuisances). Section 33 controls the dumping of waste. The Act lays down a detailed procedure for securing abatement, provides for criminal proceedings and prescribes maximum penalties for failure to comply with an abatement notice.

<sup>602</sup> Section 85 of the Water Resources Act 1991 (UK) makes it an offence to pollute controlled waters. It prescribes a maximum penalty of three months' imprisonment and a fine of £20,000 on summary conviction, and two years' imprisonment and a fine on conviction on indictment.

<sup>603</sup> Section 137 of the Highways Act 1980 (UK) makes it a summary offence punishable by a fine not exceeding level 3 on the standard scale willfully to obstruct free passage along a highway.

<sup>604</sup> Section 1 of the Protection from Harassment Act 1997 (UK) creates a crime of harassment, punishable summarily by imprisonment for a maximum of six months and a fine on scale 5. If the harassment involves repeated threats of violence the defendant is liable under section 4, on conviction on indictment, to five years' imprisonment and a fine.

<sup>605</sup> Section 63 of the Criminal Justice and Public Order Act 1994 (UK) confers powers on the police to remove persons attending or preparing for a rave 'at which amplified music is played during the night (with or without intermissions) and is such as, by reason of its loudness and duration and the time at which it is played, is likely to cause serious distress to the inhabitants of the locality'. Breach of the statutory requirements is punishable on summary conviction by imprisonment for up to three months and a fine not exceeding level 4 on the standard scale.

<sup>606</sup> Section 85 of the Postal Services Act 2000 (UK) makes it an offence to send by post anything which is likely to injure a postal worker or anything which is indecent or obscene. On summary conviction the offence is punishable by a fine, on conviction on indictment by imprisonment for a maximum of 12 months and a fine.

<sup>607</sup> See JR Spencer 'Public Nuisance – A Critical Examination' (1989) 48 CLJ 55 on the development of civil remedy at common law and the distinction between the criminal and civil proceedings in respect of public nuisances.

<sup>608</sup> JR Spencer 'Public Nuisance – A Critical Examination' (1989) 48 CLJ 55, at pp 66-73.

nineteenth century and Chancery granted injunctions that were permanent and not merely temporary ones until a criminal trial took place. In these cases there was no prosecution in the background, the relator action was the only proceedings taken. Relator actions thus rapidly became the usual means of dealing with the more common types of public nuisance and rapidly became a proceeding quite separate and distinct from criminal prosecution. Prosecutions then virtually died as a method of dealing with continuing health-hazards, and were thereafter used mainly to deal with singular actions of misbehaviour affecting the public generally.<sup>609</sup> JR Spencer summarises the development of the civil suit remedy thus:

“The idea of the Attorney General applying in Chancery for an injunction to restrain the criminal offence of public nuisance occurred to contemporary lawyers quite naturally as an amalgam of various existing notions. First, the Attorney General was already in the habit of coming to Chancery to ask for injunctions. He sought them against those who were committing private nuisances against the property of charitable foundations. He also regularly sought injunctions against those who encroached on Royal property and, by way of an extension to this, he sometimes sought injunctions to stop people building wharfs in navigable waterways which would obstruct harbours used by the Royal Navy – something very similar to obtaining an injunction to restrain an encroachment on a public highway. From here it was only a small step to say that the Attorney General can seek an injunction to restrain any public nuisance...”

Courts have regularly affirmed that the Crown retains the right at common law to proceed against offenders in the civil jurisdiction, for abatement of a public nuisance, even where the offence of public nuisance itself has been codified as a statutory offence.<sup>610</sup> This is so because the remedy of civil suit for abatement of a public nuisance is a separate remedy available to the Crown from the remedy of criminal prosecution for a public nuisance. The civil suit remedy exists concomitantly with the criminal prosecution remedy as a separate

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<sup>609</sup> *ibid* at p 71.

<sup>610</sup> *Attorney-General of British Columbia v Couillard* [1984] 11 DLR(4<sup>th</sup>) 567, 14 CCC (3d) 169; *Attorney General (ex rel Pratt) v Brisbane City Council* (1988) 1 QdR 346; *City of Chicago v Beretta USA Corporation* 213 Ill 2d 351, 821 NE 2d 1099 (2004).



remedy. In *Attorney-General of British Columbia v Conillard*,<sup>611</sup> the Supreme Court of British Columbia held that the Attorney General may sue in the civil jurisdiction for abatement of a public nuisance even when the acts the subject of the public nuisance and injunction are covered exhaustively by a Criminal Code provision. The Court considered the case at bar “a perfect example of how the common law supplements legislation for the protection of the public.”<sup>612</sup> The real question is never the standing of the Attorney-General to sue for injunctive relief for a public nuisance, but, rather, the jurisdiction of the court; for, “in a proper case, the Attorney General has standing to bring proceedings for enforcing any law within the province.” McEachern CJSC, speaking for the Supreme Court of British Columbia, affirmed that:

“...[I]t is apparent that a small group of prostitutes has assumed, quite incorrectly, that causing public inconvenience for the purpose of prostitution is lawful subject only to prosecution under the Criminal Code... It is not, and if it amounts to a public nuisance anywhere in the province, it may be enjoined upon a proper application being made by the Attorney General... Those who would defile our city must understand that in addition to the criminal law, the citizens of this country are protected by the common law which is a statement of the accumulated wisdom of history. But it is a dynamic force which is always ready to respond to the reasonable requirements of civilization.”<sup>613</sup>

The Supreme Court of Queensland has also affirmed that courts have jurisdiction to grant an injunction at the suit of the Attorney-General in relator proceedings even where the issues the subject of the suit lie entirely within the competency of the defendant local government pursuant to local government legislation.<sup>614</sup> In this case, the local government sought to reclassify a narrow strip of land between houses, used as a pathway, as a laneway for vehicular traffic in a suburb of the city of Brisbane. Residents disapproved and obtained the

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<sup>611</sup> [1984] 11 DLR(4th) 567, 14 CCC (3d) 169, followed *Attorney-General of Ontario v Dieleman* [1994] 20 OR (3d) 229.

<sup>612</sup> [1984] 11 DLR(4th) 567, 14 CCC (3d) 169, at para [29] (McEachern CJSC).

<sup>613</sup> [1984] 11 DLR(4th) 567, 14 CCC (3d) 169, at paras [26] and [27] (McEachern CJSC).

<sup>614</sup> *Attorney General (ex rel Pratt) v Brisbane City Council* (1988) 1 QdR 346 at p 353, following *Attorney-General v Blackpool Corporation* (1907) 71 JP 478.

fiat of the Attorney General to sue for an injunction. They claimed that as the pathway was being used exclusively for foot passengers, use of it for vehicular traffic was a use contrary to the purpose for which it was dedicated. The local government claimed that they had powers under statute to reclassify the pathway and that the Attorney General had no standing to sue on grounds of public nuisance, nor had the court jurisdiction to grant the injunction sought, because control and regulation of local roads lay entirely within the competency of the local government pursuant to the then Local Government Act 1936-1986.

The Supreme Court of Queensland held, citing *McBride & Co. v. Brisbane Municipal Council*, that the provisions of section 30 of the then Local Government Act which gave the Council the functions of management, control, and regulation of use of roads, including a highway, such as the pathway, dedicated to the public, also created an obligation to prevent nuisances occurring in respect of such roads.<sup>615</sup> Though the Court accepted that there was little authority that a body such as the Council is obliged to suppress nuisances on public ways under its control, as distinct from refraining from causing or encouraging such nuisances itself, the Court held, following *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, that an occupier or other person having control of land may be liable for nuisances on the land of which he is aware even though caused by some third person without his authority. McPherson J opined that,

“Any excessive or unauthorised use of a public way is a public nuisance at common law and may be restrained at the suit of the Attorney-General. There were, and still are, several different kinds of proceedings available for this purpose. One was by indictment for public nuisance, which was a common law misdemeanour: see now s.230 of *The Criminal Code*; another by proceedings for an injunction: see Woolrych: *Law of Ways* (1847), at 423–424; another by prerogative writ of mandamus against a person subject to a public duty to keep the highway open and in repair. A private individual could, of course, sue in respect of a public nuisance only if he sustained injury over and above that suffered by

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<sup>615</sup> In *McBride & Co. v. Brisbane Municipal Council* (1885) 2 Q.L.J. 73,76, Lilley C.J. said in arguendo that “whoever has charge of a highway is bound to prevent nuisances”.

other subjects; but that is of no relevance here, where the Attorney-General is the plaintiff.”<sup>616</sup>

An Attorney General is entitled under the general law to an injunction restraining the Council from permitting the pathway from being used for vehicular traffic.<sup>617</sup>

Both *Couillard* and *ex rel Pratt* are consistent with earlier decisions such as *Attorney General v Ashbourn Recreation Ground*, where the court said that an injunction could be granted even though the breach of a statutory duty was one which Parliament had decreed to be punishable on prosecution with a fine, thus suggesting that the mode of enforcement was meant to be through the criminal courts.<sup>618</sup> Further, the House of Lords for the United Kingdom have upheld the powers of the Crown to also prosecute, at common law, for an offence of public nuisance, provided that Parliament does not expressly abolish, when enacting the statutory offences, the corresponding aspect of the common law offence of public nuisance. The House stated, at paragraph 52 of their judgment in *Rimmington*:

“...[A] charge could not have been regarded as bad simply because it was framed in terms of the common law rather than in terms of the statute... [W]here Parliament has not abolished the relevant area of the common law when it enacts a statutory offence, it cannot be said that the Crown can never properly frame a common law charge to cover conduct which is covered by the statutory offence. Where nothing would have prevented the Crown from charging the defendant under the statute and where the sentence imposed would also have been competent in proceedings under the statute, the defendant is not prejudiced by being prosecuted at common law and can have no legitimate complaint.”<sup>619</sup>

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<sup>616</sup> (1988) 1 QdR 346 at p 352.

<sup>617</sup> (1988) 1 QdR 346 at p 353.

<sup>618</sup> [1903] 1Ch 101. A builder was restrained from erecting a housing estate in contravention of local by-laws.

<sup>619</sup> *R v Rimmington, R v Goldstein* [2005] UKHL 63 at para [52] (Lord Roger of Earlsferry), [2006] 1 AC 459, [2005] 3 WLR 982.

This view is supported by judgments in *City of Chicago v Beretta USA Corp*,<sup>620</sup> and *Attorney-General of New York v Sturm, Ruger & Co Inc*,<sup>621</sup> and *Wheeler v Lebanon Valley Racing Corp*,<sup>622</sup> and *City of New York v Beretta USA Corp*,<sup>623</sup> wherein the courts state, consistently, that the codification of certain common law nuisances as statutory offences does not exclude common law nuisances not codified therein from being declared as public nuisances by the courts.

Although legislatures have codified public nuisance in terms of its criminal jurisdiction, the civil suit for abatement of a public nuisance in the civil jurisdiction remains a common law action until such time as it too is codified. The effect of the juridical pronouncements in response to challenges that common law remedies for public nuisance are now obsolete may be summarised as follows:

- (i) Where public nuisance has been codified as a criminal offence in a criminal code, criminal proceedings may only be instituted under the criminal code and not at common law; but the separate common law remedy of civil suit for abatement of a public nuisance in the name of the Crown survives and continues to exist as a separate common law remedy to statutory criminal prosecution; (*Attorney-General of British Columbia v Couillard* [1984] 11 DLR(4<sup>th</sup>) 567, 14 CCC (3d) 169; *Attorney General (ex rel Pratt) v Brisbane City Council* (1988) 1 QdR 346; *City of Chicago v Beretta USA Corporation* 213 Ill 2d 351, 821 NE 2d 1099 (2004));
- (ii) Where circumstances that were formerly the subject of proceedings for public nuisance are now the subject of specific legislative arrangement creating new statutory offences, criminal proceedings may only be instituted under the new legislative arrangement; but the separate common law remedy of civil suit for abatement of a public nuisance in the name of the Crown survives and continues to exist as a separate common law remedy; (*Attorney-General of British Columbia v Couillard* [1984] 11 DLR(4<sup>th</sup>) 567, 14 CCC (3d) 169; *Attorney General (ex rel Pratt) v Brisbane City Council* (1988) 1 QdR 346; *City of Chicago v Beretta USA Corporation* 213 Ill 2d 351, 821 NE 2d 1099 (2004));

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<sup>620</sup> 213 Ill 2d 351, 821 NE 2d 1099 (2004), at pp 382-83 of the former report.

<sup>621</sup> 309 AD 2d 91, 761 NYS 2d 192 (2003).

<sup>622</sup> 303 AD 2d 791, 755 NYS 2d 763 (2003) at p 792 of the former report.

<sup>623</sup> 315 F Supp 2d 256 (2004) at p 276.

- (iii) Where circumstances yield a public nuisance which are not required to be dealt with by way of proceedings under a specific legislative arrangement, the Crown may either seek criminal prosecution at common law, or, the Crown may seek to institute civil suit for abatement of a public nuisance at common law. The Court of Appeal decisions of *R v Shorrock*,<sup>624</sup> and *R v Madden*,<sup>625</sup> and the House of Lords decision in *Rimmington*, confirm that although the common law offence of public nuisance has been comparatively rarely relied on by prosecutors in recent years, because of the increased availability of statutory offences covering large areas of what used to be the subject matter of prosecutions for the common law offence, it still exists at common law to cover those areas not included in new legislative frameworks.

The civil remedy for abatement of a public nuisance at the suit of the Attorney-General *ex officio* or *ex relatione* remains relevant and important for the protection of public rights. The standing of the Attorney-General to bring proceedings for abatement of a common law public nuisance is an intrinsic factor in the protection of public rights. The common law remedy of civil suit has been declared by the courts to have survived codification. The courts have held that codification of the offence of public nuisance as a criminal offence affects only the criminal prosecution remedy that existed at common law and does not affect the civil suit remedy which existed and continues to exist as a parallel, twin, or concomitant remedy separate from criminal prosecution. Professor Jamie Cassels in his article on prostitution and public nuisance provides a similar view. The author wrote:

“...[I]t would appear that the jurisdiction of the courts to regulate public conduct is not limited by existing legislation and that there remains a residual common law jurisdiction to define and protect public rights.”<sup>626</sup>

The existence of statutory public nuisances, or the codification of the common law of public nuisance in a Criminal Code, whereby a Code purports to exhaustively define public

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<sup>624</sup> [1993] 3 WLR 698 (CA), at p 701.

<sup>625</sup> [1975] 1 WLR 1379.

<sup>626</sup> J Cassels ‘Prostitution and Public Nuisance: Desperate Measures and the Limits of Civil Adjudication’ (1985) 63 Can Bar Rev 764 at p 782, cited with approval in *Attorney-General of Ontario v Dieleman* [1994] ONSC 7509 at para [473], [1994] 117 DLR (4th) 449, [1994] 20 OR (3d) 229 (Adams J).

nuisance, does not preclude the Attorney General from recourse to the common law to seek abatement of a public nuisance at common law: See, for example, *Attorney-General (ex rel Pratt) v Brisbane City Council* (1988) 1 Qd R 346, following *Attorney-General v Blackpool Corporation* (1907) 71 JP 478. The common law right to action to abate public nuisance exists independently of any statutory right, unless the statutory right clearly and unambiguously abrogates the common law right.<sup>627</sup> The judgment of Justice Garman in the recent case *City of Chicago v Beretta USA Corporation*,<sup>628</sup> is dispositive of this issue:

“Our own research reveals that the Criminal Code contains a nuisance provision listing 17 categories of conduct or uses of land that are public nuisances. 720 ILCS 5/47-5 (West 2002). In addition, the General Assembly has enacted numerous other statutes defining certain conduct as constituting a public nuisance. See, e.g., 510 ILCS 5/15(b) (West 2002) (permitting a dangerous dog or other animal from leaving the premises of the owner without a leash or other method of control); 515 ILCS 5/1-215 (West 2002) (use of illegal fishing device); 605 ILCS 5/9-108 (West 2002) (planting of willow trees or hedges on the margin of a highway);...

As these examples well illustrate, the legislature has the power to declare something to be a nuisance that was not such at common law. *People v Jones* 329 Ill App 503, 69 NE2d 522 (1946); *Village of Gurnee v Depke* 114 Ill App2d 162, 251 NE2d 913 (1969). **However, the codification of certain common law nuisances in the Criminal Code and the legislative declaration that certain other conditions constitute nuisances does not exclude common law nuisances not codified therein from being classed as public nuisances.** *People ex rel Dyer v Clark*, 268 Ill 156, 108 NE 994 (1915). See also *Gilmore*, 261 Ill App 3d at 661 (public nuisance statute does not displace common law actions;

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<sup>627</sup> *Gilmore v Stanmar Inc* 261 Ill App 3d 651, applying *City of Chicago v Festival Theatre Corp* 91 Ill 2d 295 (1982) at p 303, considered in *City of Chicago v Beretta USA Corporation* 213 Ill 2d 351 (2004) at p 383. See also *R v Shorrocks* [1993] 3 WLR 698 (Court of Appeal) at p 701E (Justice Rattee). And see *Attorney-General (ex rel Pratt) v Brisbane City Council* (1988) 1 Qd R 346., following *Attorney-General v Blackpool Corporation* (1907) 71 JP 478.

<sup>628</sup> 213 Ill 2d 351, 821 NE 2d 1099 (2004).

common law right to action to abate public nuisance exists independently of any statutory right). As this court observed in *Festival Theatre*: ‘Equitable jurisdiction to abate public nuisances is said to be of ‘ancient origin,’ and it exists even where not conferred by statute, where the offender is amenable to the criminal law, and where no property rights are involved. Too, in a common law action, the extent of the concept of public nuisance is not limited to those activities the legislature has declared public nuisances.’ *Festival Theatre* 91 Ill 2d at 303.’<sup>629</sup>

A civil suit for abatement of a public nuisance is preventative in its nature, not retributive. The common law offence of public nuisance is an important tool for the Executive Government in administering the law; a tool that is unique to the common law offence of public nuisance. A civil action for redress of a public nuisance remains an important action for the Executive of Government in an age of statutory proliferation because it is not dependent on statute; nor is it dependent on the criminal law; nor is it focussed to punishment or pecuniary penalty or blame. The civil suit for abatement of a public nuisance on *ex officio* or *relator* action by the Attorney-General survives codification of the common law of public nuisance,<sup>630</sup> and is not dependent on the continuing use of criminal proceedings for common law offences of public nuisance, because such civil suit is a separate remedy and separate proceeding at common law. It is not correct to state that no civil suit for abatement of a public nuisance would exist unless public nuisance is a criminal offence at common law or under statute. The civil suit remedy against a public nuisance is a separate proceeding entirely and if precedent can be found to support an argument that the act which is sought to be enjoined is a public nuisance, then the courts will found jurisdiction to grant an injunction.<sup>631</sup>

The action for redress of a public nuisance enables the Executive of Government to protect the health and wellbeing of the people generally and to work concomitantly with the civic

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<sup>629</sup> *ibid* at pp 282-283 (emphasis added).

<sup>630</sup> *Attorney-General of British Columbia v Couillard* [1984] 11 DLR(4<sup>th</sup>) 567, 14 CCC (3d) 169; *Attorney General (ex rel Pratt) v Brisbane City Council* (1988) 1 QdR 346; *City of Chicago v Beretta USA Corporation* 213 Ill 2d 351, 821 NE 2d 1099 (2004).

<sup>631</sup> *ibid*.

standards of the people and with statutory regulation to prevent or to stop acts which are harmful to public rights. Statutory law is not undermined in this process; nor is an unreasonable level of responsibility placed on individuals to institute their own expensive civil suits. The remedy civil suit for abatement of a public nuisance enables the Executive Government to fulfil its constitutional function as *parens patriae* and remains an important legal tool in the modern legislative environment.

#### 4. Concluding remarks

Whilst many circumstances that were formerly the subject of prosecution or a relator action for a public nuisance are now the subject of specific statutory remedies under specific enactments of the Legislature, such as acts causing environmental harm,<sup>632</sup> this does not mean that the common law offence of public nuisance is obsolete. On the contrary, the offence of public nuisance remains critical to the criminal law and common law. The modern relevance of such remedy may be seen in the light of increased pressure to maximize profit, media exposure and advertising revenue from public exhibitions of sporting events. By what law is it to be determined whether a new sport or game, devised by an individual solely for the purposes of making money, and involving conduct or activity that is odious to the community, is lawful or not? What of dwarf throwing, which was mentioned in Chapter 8 above? What of some new game which might have as the basis of its rules of play the binding of players with ropes, alike a rodeo? What of the use of dangerous weapons in sports such as Martial Arts? What of sports which appropriate public beaches, or public parks, for their exclusive use, preventing the public right to unhindered recreation? What of public sports events which appropriate the public highways for the exclusive use of the sport, such as triathlon and cycling sporting events, thereby preventing public access to and unhindered use of the public highway? What of the playing of very popular sports, such as football, on every night of the week to the detriment of local communities who would have to live their lives at the behest of great throngs of rowdy and vociferous crowds attending football games? In each of these instances, in every sport devised and played, there is,

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<sup>632</sup> See, eg, Section 79(1) of the Environmental Protection Act 1990 (UK) as amended, which establishes nine categories of statutory nuisance.



necessarily, an interface with public morals, public peace, public health, and the public right to be free of unlawful obstruction or inconvenience. Ought the neighbours of the grand stadiums wherein a football game is played tolerate the unabated increase in the noise and bacchanalian behaviour of fans in and about the football stadium every night simply because a football association desires to maximize its profit? Whether a sport played on particular occasions at particular times or days or whether sports create obstruction, endangerment to health or life or public peace, amounting to a public nuisance, are all questions of fact for a court to determine.

Sir John Smith notes, in contradistinction to Spencer's censure of public nuisance, above, that: "A great many varieties of nuisance are now the subject of special legislation and proceedings are unlikely to be brought at common law where there is a statutory remedy. But the common law may still be useful where no statute has intervened..."<sup>633</sup> Public nuisance is a useful tool for the Executive of Government to protect public rights and to limit the excesses arising from the unchecked growth of public sporting fixtures. "[A]t the core of public nuisance lies a concern to protect the use and enjoyment of public resources and facilities..."<sup>634</sup>

Many public sporting events involve ever increasing degrees of noise with music, entertainment, concerts, crowd participation, and crowd disturbances. Alcohol is habitually utilised by fans to augment the occasion. Sporting associations have of recent times changed the competition structure of their sports and hold many more, if not an excessive number of, games, finals, preliminary finals, and secondary competitions, which used not to occur at an earlier time when the sporting association was not corporative, and many of the players were not professional. There is an increase in the usage of public spaces, such as beaches, parks and roads, for public sporting competitions. Such competitions appear to supplant the public right to use public areas, such as beaches and parks, for recreation and physical exercise in favour of a commercial sport activity. Must the public give up their public right to use the beach and to swim in the surf because a corporatized sporting association seeks to

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<sup>633</sup> Sir John Smith (ed) *Smith & Hogan Criminal Law* (8<sup>th</sup> edn Butterworths London 1996) at p 773.

<sup>634</sup> J Cassels 'Prostitution and Public Nuisance: Desperate Measures and the Limits of Civil Adjudication' (1985) 63 Can Bar Rev 764 at p 784, cited with approval in *Attorney-General of Ontario v Dieleman* [1994] ONSC 7509 at para [474], [1994] 117 DLR (4th) 449, [1994] 20 OR (3d) 229 (Adams J)

conduct races for their own profit using the public beaches, parks, and roads, to the exclusion of the public? The Court of Appeal for England and Wales stated, recently, in reference to public nuisance: “In our view the offence of causing a public nuisance is a proper and proportionate response to the need to protect the public from acts, or omissions, which substantially interfere with the comfort and convenience of the public as being taken in the interests of public safety, for the prevention of disorder, for the protection of health and morals, and in particular the need to protect the rights of others. The level of imprecision inherent in the offence is necessary to enable it to be applied flexibly to meet new situations.”<sup>635</sup>

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<sup>635</sup> *R v Goldstein, R v R* [2003] EWCA Crim 3450 at para [25], [2004] 1 WLR 2878 at p 2887 (Court of Appeal). *Goldstein* was appealed to the House of Lords: *R v Rimmington, R v Goldstein* [2005] UKHL 63, [2006] 1 AC 459, [2005] 3 WLR 982.

## **Part 3    Applying Public Nuisance to Sport**

## Chapter 10

### Public sport events & the principles of public nuisance

#### 1. Are public exhibitions of sport public nuisances?

Where a publicly exhibited sporting event creates obstruction, annoyance or discomfort to the public, endangers the life, or health or safety of the public, or offends public morals, it may be proscribed as a public nuisance. A public nuisance extends to everything that endangers life or health, gives offence to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property, including public exhibitions of sport.<sup>636</sup>

Adopting the judicially approved definitions of public nuisance and applying these definitions to sports as practised in contemporary times yield numerous factual circumstances wherein public exhibitions of sport may be delimited and controlled by the Executive authority of the state acting on behalf of the people as *parens patriae*. These factual situations prove important as a guide for the Executive of Government who, as *parens patriae*,

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<sup>636</sup> *Sherrod v Dutton* 635 SW 2d 117 (Court of Appeals of Tennessee 1982) at p 119, citing with approval *Caldwell v Knox Concrete Products* 54 Tenn App 393, 391 SW 2d 5 (1964) and *City of Nashville v Nevin* 12 Tenn App 336. For the definition of public nuisance see: JF Archbold *Archbold's Criminal Pleading and Practice* (44<sup>th</sup> edn 1992) vol 2, p 3374, paras [31]-[40]; (2003 edn Sweet & Maxwell London 2003) at p 2550, paras [31]-[40]; applied in *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 (Court of Appeal) at p 184 (Lord Justice Romer); applied in *R v Shorrock* [1993] 3 WLR 698 (Court of Appeal) at p 701 (Justice Rattee); applied in *R v Rimmington*; *R v Goldstein* [2005] UKHL 63, [2006] 1 AC 459, [2005] 3 WLR 982, at paras [10] and [36] (Lord Bingham of Cornhill) and para [45] (Lord Roger of Earlsferry). For the definition of public nuisance used in the United States of America, see: *Copart Industries Inc v Consolidated Edison Co of New York Inc* 41 NY 2d 564 at p 568, 394 NYS 2d 169, 362 NE 2d 968 (1977) (Justice Cooke), citing *New York Trap Rock Corp v Town of Clarkston* 299 NY 77 (1948) at p 80; applied in *Hoover v Durkee* 212 AD 2d 839, 622 NYS 2d 348 (1995) at p 840 of the former report; *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91, 761 NYS 2d 192 (2003); and *Wheeler v Lebanon Valley Racing Corp* 303 AD 2d 791, 755 NYS 2d 763 (2003) at p 792 of the former report; and *City of New York v Beretta USA Corporation* 315 F Supp 2d 256 (2004) at p 276

is foremost responsible for protecting public rights. The needs of the public are not necessarily in agreement with the needs of sports federations. On the one hand, the Executive of Government is faced with seeking to preserve and to protect those common law public rights which the courts have declared extant in public nuisance suits, such as the public right to quietude,<sup>637</sup> the public right to use of places dedicated to public use,<sup>638</sup> or the public right to safety.<sup>639</sup> On the other hand, the Executive of Government is faced with a sports industry that is prevalent and financially motivated, desirous of increasing the financial gain of athletes and those employed in the management and ownership of sports federations and franchises. Financially motivated public sports competitions must be staged at increasing levels, attracting larger crowds to larger arenas to a greater number of tournaments, competitions and games, in public areas or at places accessible to the public, in order to be profitable for those with pecuniary interest in sport. Heightened levels of public sporting competition challenge the legal protections provided to the public generally by virtue of public nuisance at common law. Faced with this challenge, the Executive of Government ought to be conscious of the legal tools attendant with the offence of public nuisance – the ex officio and relator actions for abatement of a public nuisance – and, utilizing legal procedure or the threat of legal action, ought to protect public rights by limiting the excesses of publicly exhibited sporting competition. Should a government desire to augment public exhibitions of sport, to the possible detriment to public rights, they ought to amend the law through the Legislature. The common law does not support the solipsistic growth of publicly exhibited sport events. In the words of the Vice-Chancellor in *Dewar v City and Suburban Race Course Co*: “No majority, however large, is entitled to interfere with the common right of a minority, though small, to the enjoyment of the comfort and quiet of

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<sup>637</sup> See *Dewar v City and Suburban Race Course Co* [1899] 1 IR 345; *Attorney-General of Ontario v Dieleman* [1994] CanLII 7509 (Ontario Supreme Court).

<sup>638</sup> See *Hue v Whiteley* [1929] 1 Ch 440 at p 445 cited with approval in *Jones v Bates* [1938] 2 All ER 237 at p 241 (Slesser LJ), at p 245 (Scott LJ); *Attorney-General and Newton Abbot RDC v Dyer* [1947] Ch 67 at p 85. And see *R v Doncaster Metropolitan Borough Council ex parte Braim* The Times, 11 October 1986, where McCullough J held that a public right of recreation can be created at common law based on long user, in the instant case being use of a common over many years for recreative activities such as walking, jogging, flying kites and model aeroplanes, picnicking and ball games and French cricket. And see, further, *North Cronulla Precinct Committee Inc v Sutherland Shire Council* [1999] NSWCA 438 at para [4] citing with approval *Brodie v Mann* [1885] 10 App Cas 378, *Poole v Huskinson* (1843) 11 M & W 830, 152 ER 1039, and *R v Oxfordshire County Council; ex parte Sunningwell Parish Council* [1999] UKHL 28, [1999] 3 WLR 160 at p 168, cited at paras [5] and [6] in *North Cronulla Precinct Committee* (Sheller JA).

<sup>639</sup> See *Cunningham v Reading Football Club Ltd* The Times 22 March 1991; *State ex rel Attorney-General v Canty* 207 Mo 439 (1907); *Castle v St Augustine's Links Ltd* (1922) 38 TLR 615.

their homes, and the free use of the public thoroughfares which lead to them. 'The Legislature alone, acting for the common weal, has this power entrusted to it.'<sup>640</sup> Common law precedents reveal that a broad variety of public sporting events have been declared to be public nuisances because they create circumstances which are an inconvenience or obstruction to the public or which endanger the public's right to comfort, or which endanger public health, or public morals.

In Part 1 of this thesis, the question as to whether public exhibitions of sporting events create public nuisances by interfering with use by the public of a public place, such as a beach or park, was assessed. Here, in Part 3 of this thesis, the appraisal of the public nuisance precedents is presented under three broad headings: namely, (1) public sporting events causing obstruction or inconvenience to the public, (2) public exhibitions of sporting events causing annoyance or discomfort to the public; and (3) public exhibitions of sporting events endangering public health, public safety, or life of the public.

## 2. Who is responsible for the public nuisance where a publicly exhibited sporting event creates a public nuisance?

The owner, operator, or manager, of a sports facility or sports team, or the entity responsible for staging or promoting a public sporting event, may severally and jointly be required to stop the sporting event from taking place or to abstain from staging a future planned sporting event where the public sporting event creates or is likely to create a public nuisance. Public nuisance thus has a very wide application for the disparate organizations, corporations, governments and individuals connected with the staging of publicly exhibited sports events. In *Attorney-General v Blackpool Corporation*,<sup>641</sup> the local government was held responsible for perpetrating a public nuisance in licensing a motorcar race. In *Castle v St*

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<sup>640</sup> [1899] 1 IR 345 at p 356.

<sup>641</sup> (1907) 71 JP 478, followed *Attorney General (ex rel Pratt) v Brisbane City Council* (1988) 1 QdR 346 at p 353.

*Augustine's Links Ltd*,<sup>642</sup> the sports association was liable. And in *State of New York v Waterloo Stock Car Raceway Inc*,<sup>643</sup> sports event promoters were liable.

The entity responsible for staging the publicly exhibited sporting event may create a nuisance in two ways: (1) either through a direct act or omission attributable to such entity, such as, for example, where a motor sport event creates noise directly causing annoyance to the public by impinging on the public right to quietude (*Attorney-General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (BCSC)); or (2) indirectly, where the combined effect of staging a sporting event and the conduct and activities of participants in or attendees to the sporting event creates a public nuisance, such as where a publicly exhibited sporting event draws crowds of spectators causing obstruction to the public by impinging on the public right of way on the highway (*Shaw's Jewelry Shop Inc v New York Herald Co* 170 AD 504, 156 NYS 651 (NY App Div 1915), affirmed by the New York Court of Appeals, 224 NY 731, 121 NE 890 (1918)).

### 3. Public nuisance may be created by the direct actions of a sporting event or by the actions of people attending at a sporting event

Public nuisance suits have been successful where the harm created is directly attributable to defendant or defendant's activity. In *Hoover v Durkee*,<sup>644</sup> the evidence supported the finding by the court that the racetrack was a public nuisance. The noise generated by the track drowned out all other sounds, prevented conversation at home or on the telephone, even with windows closed, the public address system at the racetrack could be heard from a significant distance, and there was an increase in traffic which was an inconvenience. The public nuisance was caused by the direct acts of the sport in question. In *State of New York v Waterloo Stock Car Raceway*,<sup>645</sup> the operation of a racetrack for stock cars constituted a public nuisance that should be discontinued because the activities of the defendant directly created discomfort and inconvenience indiscriminately. The evidence was to the effect that

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<sup>642</sup> (1922) 38 TLR 615.

<sup>643</sup> 96 Misc 2d 350, 409 NYS 2d 40 (1978).

<sup>644</sup> 212 AD 2d 839, 622 NYS 2d 348 (1995).

<sup>645</sup> 96 Misc 2d 350, 409 NYS 2d 40 (1978) at p 357 of the former report.

everyone had their eardrums ‘hammered away’ during night stock car races, there was dust accumulation on their properties in the aftermath of the races, and everyone lived in fear for their continued safety.<sup>646</sup> Again, the publicly exhibited sporting event itself created a public nuisance.

Whilst, on the one hand, a defendant may cause a public nuisance directly and be liable for it, a defendant need not be the sole source of a nuisance so long as the combined activities of the defendant and others amounts to a public nuisance. The following cases demonstrate how a lawfully conducted activity may nonetheless amount to a public nuisance and be restricted. Even where a sports federation, or the manager of a sporting event, or a sporting club, in their conduct taken alone would not amount to a public nuisance, the sports federation, manager or club is still the proper subject of injunctive relief because their conduct, taken in conjunction with others, constitutes a public nuisance.

In the leading case of *R v Moore*,<sup>647</sup> the defendant maintained on land of his, abutting the public highway, a rifle shooting range. The defendant was a gun-maker and had taken some land at Bayswater, in the county of Middlesex, distant about one hundred feet from the north side of the main London and Uxbridge road, and had enclosed part of it and converted it into a shooting range. People attending at the shooting range and engaging in the sport, shot at fixed targets and at pigeons. A large number of people congregated outside the defendant’s land on the public highway and in adjacent fields in order to shoot the pigeons which escaped from the guns on the defendant’s land. The defendant was indicted for a public nuisance. Lord Tenterden CJ directed the jury that the defendant was responsible for the activities of the people gathering on the highway, even though they were not invited on to the defendant’s land to participate in the shooting. He gave leave, however, for the defendant to argue the point in the Court of King’s Bench. The defendant was found guilty. In the course of his judgment in that court, Lord Tenterden CJ said at page 188: “If a person collects together a crowd of people to the annoyance of his

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<sup>646</sup> Note *Johnson v City of New York* 186 NY 139, 78 NE 715 (1906) where a public nuisance was created by the direct act of appropriating the streets of New York for a motorcar race; and note, *Aldridge v Van Patter* [1952] OR 595, [1952] 4 DLR 93, [1952] OWN 516, where a public nuisance was created by the direct act of a motorcar crashing through a fence surrounding the racetrack into a public park.

<sup>647</sup> (1832) 3 B & Ald 184.



neighbours, that is a nuisance for which he is answerable. And this is an old principle.”

Littledale J concurred: “It has been contended that to render the defendant liable, it must be his object to create a nuisance, or else that must be the necessary and inevitable result of his act. No doubt it was not his object, but I do not agree with the other position; because if it be the **probable consequence** of his act, he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it.”<sup>648</sup>

Swinfen Eady LJ adopted that test in *Lyons, Sons & Co v Gulliver*,<sup>649</sup> and in the same case Cozens-Hardy MR said: “...a man is or may be liable to an indictment for attracting, even by something lawfully done on his own premises, a crowd in the street adjoining his premises.”<sup>650</sup> Even if a sport were lawfully played, in and of itself, the persons who promote, operate, or conduct a public sporting fixture may nonetheless be liable on indictment or civil suit for a public nuisance if the crowds, or patrons attending at, or the participants participating in the public sporting event create an obstruction, annoyance, inconvenience, or discomfort to a class of the public, attendant with such sporting event, or if the event is one which creates an endangerment to the life, health, or morals of the public. It is probable that where crowds that gather at sporting events and cause endangerment to health and life, such as what occurred at Hillsborough in England in April 1989 when 95 attendees to a football match were crushed to death in a crowd congestion, they create a public nuisance for which the owners, operators, or managers of the sporting event are liable at common law, and not individual members of the crowd.

In *Dewar v City and Suburban Race Course Co*,<sup>651</sup> horseracing on a Sunday was enjoined at the suit of private plaintiffs. Nuisance was caused to local residents adjoining the racetrack by vast crowds attending at the races. In granting an injunction the Vice-Chancellor applied *R v Moore*, stating:

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<sup>648</sup> *ibid* at p 188 (emphasis added).

<sup>649</sup> [1914] 1 Ch 631 at p 642.

<sup>650</sup> *ibid* at p 642. In this case the defendants were liable for creating a nuisance because a queue formed outside the theatre they operated and stretched down the street, thereby obstructing access to shops in the street.

<sup>651</sup> [1899] 1 IR 345.

“The principles on which the Courts act and the general application of the principles are well settled. They are clearly enunciated by the eminent Judges who decided the case of *The King v Moore* 3 B. & Ad. 184, a case which has ever since been followed, where it was laid down that a man cannot be allowed to make a profit to the annoyance of his neighbours; that if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable; that it need not be proved that it is his object to create a nuisance, or that it must be the necessary or inevitable result of his act, but if it be the **probable consequence** of his act, he is answerable as if it were his actual object; and that if the experience of mankind must lead anyone to expect the result, he will be answerable for it.”<sup>652</sup>

*R v Moore* was also applied and followed in *Newell v Izard*,<sup>653</sup> a case involving a private nuisance in the Chancery Division of the New Brunswick Supreme Court. There the defendant operated a roller skating rink. It attracted an undesirable element to the locality. Crowds attending the skating rink trespassed onto the plaintiff's property and used it as a toilet. It was held that their acts interfered with the plaintiff's use and enjoyment of his land. Chief Justice Baxter held that this was a nuisance because none of the acts complained of would have happened but for the maintenance of the skating rink. The proprietors of the skating rink were held responsible for the nuisance; and not individual members of the crowds attending at the skating rink. Had there been several households affected, rather than merely one, it is likely that the court would have found a public nuisance to have been created by the crowds attending the sports arena. In *Sunset Amusement Co v Board of Police Commissioners*,<sup>654</sup> in denying the renewal of the appellants' permit to operate a roller skating rink, the Supreme Court of California rejected the appellants' claim that its roller skating rink should not be held responsible for serious traffic congestion, numerous and varied traffic offences, thefts and misuse of private property committed by its patrons off the premises. There was substantial evidence that the appellants' operation of the rink did not comport

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<sup>652</sup> *ibid* at pp 350-351.

<sup>653</sup> [1944] 3 DLR 118 (New Brunswick Supreme Court Chancery Division) at p 123.

<sup>654</sup> 7 Cal 3d 64, 496 P 2d 840 (1972) at p 84 of the former report, appeal dismissed 409 US 1121, 93 S Ct 940 (1973).

with the peace, health, safety, convenience, good morals, and general welfare of the public, as they failed to provide adequate parking facilities, and failed to control or prevent disturbances on or near the premises.<sup>655</sup>

*Bellamy v Wells*<sup>656</sup> holds likewise. The conduct of patrons attending boxing matches at a private club in London – conduct both inside the club and outside on the street – was sufficient to create a nuisance for which an injunction was issued against the club. The fact that a defendant's conduct is otherwise lawful does not preclude liability for public nuisance.<sup>657</sup> In *Shaw's Jewelry Shop Inc v New York Herald Co*,<sup>658</sup> the court enjoined the defendants from operating a machine called an 'automatic baseball playograph' on which was reproduced images of each play of the baseball games in the 'World Series.' The court held that the exhibition constituted a public nuisance because large crowds formed in the street and on the footpath, on Broadway, to watch the baseball 'playograph'. The number of persons who witnessed the exhibition was between 30,000 and 40,000. The street became so congested that between eighty and ninety policemen were required to handle the crowd. The south-bound traffic on Broadway between Thirty-fifth and Thirty-sixth streets was substantially restricted to the easterly side of the street. The plaintiff storekeeper, whose business was hampered by the attending crowds, was entitled to an injunction for the public nuisance, as well as damages.<sup>659</sup> It is settled, following decisions in New York, England, and Canada that an otherwise lawful business, even one operating in conformity with relevant statutory requirements, may be enjoined when it creates or contributes to a public nuisance because of the manner or circumstances in which it operates.<sup>660</sup>

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<sup>655</sup> *ibid.*

<sup>656</sup> (1890) 60 LJ Rep Ch NS 156.

<sup>657</sup> See *State v Waterloo Stock Car Raceway Inc* 96 Misc 2d 350, 409 NYS 2d 40, pp 44-45 (NY Sup Ct 1978).

<sup>658</sup> 170 AD 504, 156 NYS 651 (NY App Div 1915), affirmed by the New York Court of Appeals, 224 NY 731, 121 NE 890 (1918).

<sup>659</sup> 170 AD 504 (1915) at p 508.

<sup>660</sup> *Castle v St Augustine's Links Ltd* (1922) 38 TLR 615; *Bellamy v Wells* (1890) 60 LJ Rep Ch NS 156; *Lyons, Sons & Co v Gulliver* [1914] 1 Ch 631; *Aldridge v Van Patter* [1952] OR 595, [1952] 4 DLR 93, [1952] OWN 516; *Hoover v Durkee* 212 AD 2d 839, 622 NYS 2d 348 (1995); *State of New York v Waterloo Stock Car Raceway Inc* 96 Misc 2d 350, 409 NYS 2d 40 (1978). The only exception to this rule is where the specific conduct at issue is "fully authorized by statute, ordinance or administrative regulation." See *Hill v City of New York* 139 NY 495, 34 NE 1090 at p 1092 (1893) ("The authority which will thus shelter an actual nuisance must be express . . . For, consider what the proposition is. It upholds a positive damage to the citizen and denies him any remedy . . . Surely, an authority which so results should be remarkably strong and clear.").

These decisions have important application to popular modern sports events held at the behest of sports associations now corporatized and profit driven. Injunctive relief may be obtained against a club, or manager, or organiser or promoter of a sporting event, where, for example, excessive numbers of spectators create obstruction, inconvenience or discomfort to the public, or where a riot or violent acts might occur on the part of fans, if the actions of the club, manager, or organiser is such that, taken together with the conduct of the fans, creates a public nuisance. The conduct of the sports club, manager or organiser may be nothing more than the staging of the sporting event itself; a probable innocent and lawful act in itself.<sup>661</sup> The act of the organiser of a publicly exhibited sporting fixture may be lawful, such as the scheduling of a game between two football teams. Yet, if the result of the meeting of two tribal and opposed sporting teams leads to a riot or to violent acts by participants in the sporting event, or by fans attendant at the game, a public nuisance is committed. The remedy, under civil suit for a public nuisance, at the instigation of the Attorney-General, is one of injunctive relief against the organiser of the sport, not against the individual rioters or fans. But for the conduct of the organiser of the sporting event, the crowd would not have gathered. The conduct of the organiser of the sporting event, taken in conjunction with others, creates a nuisance. This is an important aspect of the law of public nuisance. Public nuisance injunctive relief is less concerned with punishment of riotous or violent persons or fans, and instead is focussed on redressing an extant or threatened public nuisance by stopping or preventing its occurrence. A sporting club, even perceiving themselves to be innocent of any cause of riotous or violent activity amongst their fans, or claiming to have endeavoured to have done all in their power to prevent the occurrence of riotous or violent activity, may nonetheless find themselves defendants to an injunctive remedy for a public nuisance.

The civil remedy available for abatement of a public nuisance is not designed to punish any person, whether they be an individual fan who is violent or riotous, or whether they be a sports federation operating as a corporate entity. Riotous or violent activity amongst fans may involve acts which necessitate criminal sanction. Legislation in the United Kingdom has

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<sup>661</sup> *R v Moore* (1832) 3 B & Ald 184; *Bellamy v Wells* (1890) 60 LJ Rep Ch NS 156; *State of New York v Waterloo Stock Car Raceway Inc* 96 Misc 2d 350, 409 NYS 2d 40 (1978).

created specific offences for football hooliganism and football violence.<sup>662</sup> Football fans who are violent or riotous may thus be charged and receive penalties if their conduct falls within the specific terms of the Acts.<sup>663</sup> Violent conduct by fans may also lead to liability under statutory criminal law, in particular for offences of assault, grievous bodily harm, or riot. So where a very specific Act designed to address violent behaviour amongst football fans fails to address violence amongst fans attending at other sporting events such as Tennis Championships,<sup>664</sup> individuals may nonetheless be punished. But the existence of statutory sanction for, and retributive punishment of, individual persons attending sports events does not override the right of the Crown, acting as *parens patriae*, to protect the public right to safety and to suppress public nuisances. Conduct which is liable to criminal sanction may also amount to a public nuisance and be the cause of injunctive relief.<sup>665</sup> Whether violent conduct or riotous behaviour at sporting events is a public nuisance is a question of fact. Proceeding against individual fans for charges of assault or riot under the criminal law does not obviate the civil remedy at common law for abatement of a public nuisance. The Crown may obtain injunctive relief against the sports federation or organiser or promoter of a publicly exhibited sporting event to prevent the occurrence of conduct amounting to a public nuisance, such as riotous or violent conduct, in the future.<sup>666</sup>

Further, the conduct on the part of spectators or crowds attending at publicly exhibited sporting events need not be violent or riotous to amount to a public nuisance at common

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<sup>662</sup> See Football Spectators Act 1989 (UK); Football (Offences and Disorder) Act 1999 (UK).

<sup>663</sup> Note eg that various types of behaviour and conduct, including throwing bottles or any other missile on to the field of play at the Sydney Cricket Ground, is an offence for which a person is liable to a fine pursuant to s 12 Sydney Cricket Ground and Sydney Football Stadium By-law 2004 (NSW).

<sup>664</sup> Note eg the violence and riotous behaviour of 150 spectators attending the Australian Open tennis championships in Melbourne Australia in January 2007 where Croatian expatriate and Croatian national fans clashed with Serbian expatriate and Serbian national fans: B Doherty and S Spits 'Violence Mars First Day of Open' *The Age* <<http://www.theage.com.au/news/national/violence-mars-first-day-of-open/2007/01/15/1168709660638.html>> (1 February 2009). In 2009 violence erupted between Serbian and Bosnian nationals and expatriates supporting professional tennis players Delic and Djokovic born in those countries: M Tallentire 'Violence Erupts Between Serbs and Bosnians After Djokovic's Win' *The Guardian* <<http://www.guardian.co.uk/sport/2009/jan/23/australian-open-violence-djokovic>> (1 February 2009).

<sup>665</sup> Equitable jurisdiction to abate public nuisances exists even where such is not conferred by statute, where an offender is amenable to criminal law, and where no property right is involved: *City of Chicago v Festival Theatre Corp* 91 Ill 2d 295, 438 NE 2d 159, 63 Ill Dec 421 (1982) followed in *City of Chicago v Beretta USA Corporation* 213 Ill 2d 351, 821 NE 2d 1099 (2004) at p 383 of the former report. See *Commonwealth v McGovern* 116 Ky 212 (1903) where the Court of Appeals of Kentucky enjoined the staging of a prize fight on the basis that the prize fight was a public nuisance at common law, albeit that prize fighting was also an offence under the Kentucky Statutes (Kentucky Statutes 1899, ss 1284-1288).

<sup>666</sup> *Commonwealth v McGovern* 116 Ky 212 (Court of Appeals of Kentucky 1903).

law. Publicly exhibited sporting events may create a public nuisance where crowds merely conglomerate to view the sporting event, such as where spectators might gather on a beach to watch a surfing championship competition. Violence and riotous behaviour amongst fans impinges on the public right to safety. Yet innocent acts, such as standing on a beach, might impinge on the public right to use of the public beach by creating an obstruction or causing inconvenience to the public. The act or omission created either directly or indirectly need not be an offence in itself and may be entirely innocent. But if the act or omission impinges on a public right then a public nuisance is created. And so it is by looking at public rights and the circumstances whereby those public rights are impinged that makes possible a determination as to whether any particular publicly exhibited sporting event staged at any particular place amounts to a public nuisance at common law.

## Chapter 11

### Public sporting events create public nuisances by causing obstruction or inconvenience to the public

#### 1. A public exhibition of sport which causes an obstruction of or inconvenience to the use of the highway is a public nuisance

It has long been held that it is a public nuisance at common law unreasonably to obstruct or hinder free passage of the public along the highway.<sup>667</sup> Any sporting event which causes an unreasonable obstruction of the highway is a public nuisance at common law. Whether an obstruction is created, and whether the obstruction is unreasonable, are questions of fact.<sup>668</sup> Justice Joyce noted, in *Lyons, Sons & Co v Gulliver*: “Among the usual and recognized nuisances on a highway which you find enumerated in almost any text-book are these. It is a nuisance to organize or take part in a procession or meeting which naturally results in an obstruction and is an unreasonable use of the highway, to use premises situate near a highway for exhibitions, entertainments, or other purposes of such a character that crowds of persons naturally collect and obstruct the highway, not by the mere act of coming and going but by remaining on it awaiting admission or watching the spectacle or endeavouring

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<sup>667</sup> See *Brodie v Singleton Shire Council* [2001] HCA 29 at paras [253]-[259] (Hayne J), citing the long history of precedents on causes of obstruction of the highway. See also *R v Howell* (1675) 3 Keb 465, 84 ER 826.

<sup>668</sup> *Johnson v City of New York* 186 NY 139, 78 NE 715, Court of Appeals of New York (1906) at p 151. Note also *Original Hartlepool Collieries Company v Gibb* (1877) 5 Ch D 713 at p 722, where Sir George Jessel says of the question of reasonableness: “...[I]t is not unreasonable that your neighbour should give an evening party occasionally and that there should be a file of carriages running across your door or opposite your door. But it would be very unreasonable if anybody did not break the file to allow your carriage to come up to your own door, and still more unreasonable, if, instead of giving parties occasionally as people do, your neighbour were to turn his house into an assembly room or for some private purpose, in consequence of which a file of carriages came every day and obstructed the carriage way to your house. I only give these as illustrations. The law is quite clear. The question of reasonableness has been said to be a question for a jury. It must be reasonable user and nothing else.” See also *Barber v Penley* [1893] 2 Ch 447 at p 452.

to obtain information as to what is going on out of their sight.”<sup>669</sup> In *Schubert v Lee*, the High Court of Australia held that the use of a highway for purposes other than a highway must not lessen, in a substantial degree, the commodious use of the highway for legitimate purposes.<sup>670</sup> Latham CJ, Rich and Dixon JJ, stated: “If a man deposits a load of stones in a highway there is no doubt that he obstructs the highway, even though the members of the public are able to walk round the stones and even though it is not proved that any member of the public actually endeavoured to use the highway while the stones were there.”<sup>671</sup> Their Honours concluded: “The extent of the unauthorized use of a highway or other place, its duration, the nature and the occasion of its use and the time must all be taken into consideration, and so too must the character of the place. But, if the conclusion is that a substantial detraction takes place from the commodious use of the place by the members of the public who may reasonably be expected to make use of it, it is unimportant that upon a particular occasion none is in fact impeded. The question which is involved, however, is always one of degree, and therefore of fact.”<sup>672</sup>

An obstruction of the highway may be created on either of two grounds: (1) on the ground that the staging of the sport itself directly obstructs or causes inconvenience to the public’s right to use of, or passage along, the highway, by using the highway itself for the exhibition of the sport, or (2) indirectly, on the ground that the staging of the sport draws a crowd of people to spectate, which crowd obstructs or blocks up a part of the highway, thereby inconveniencing the public in the exercise of their public right.

## 2. Publicly exhibited sporting events creating obstruction or inconvenience directly

In *Schubert v Lee* the High Court of Australia declared that to carry on a trade or vocation in a street is to make use of it foreign to the purpose of a highway.<sup>673</sup> A publicly exhibited

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<sup>669</sup> [1914] 1 Ch 631 at p 637.

<sup>670</sup> [1946] HCA 28, (1946) 71 CLR 589 at p 594.

<sup>671</sup> *ibid*, following *Haywood v Mumford* [1908] HCA 62, (1908) 7 CLR 133.

<sup>672</sup> *ibid*.

<sup>673</sup> *ibid*.



sporting event conducted on a highway may directly create a public nuisance because the manner in which the event makes use of the highway is foreign to the purpose of the highway.

The earliest case in which it is reported that a sport played in a public street amounted to a nuisance at common law is the case of *Noy* occurring during the reign of Charles I (1625-1649).<sup>674</sup> A writ was granted to remove a bowling-alley erected under the eaves of Saint Dunstan's Church. A publicly exhibited sporting event erected or conducted on the highway, whether under the eaves of a church or not, is a nuisance per se at common law because such activity is contrary to the purpose of the highway. Such an activity either obstructs the public or inconveniences the public in the exercise of their common law right of passage along the highway.

In *Johnson v City of New York*,<sup>675</sup> the Court of Appeals of New York faced an appeal in a civil suit between the plaintiff spectator at a motorcar race held under the auspices of the defendants. The suit concerned liability for negligence for injuries suffered by the plaintiff. During trial, the question as to whether the motorcar race held on the public streets of New York was a public nuisance was raised, and answered. The motorcar race was held on the streets of New York on Sunday 31<sup>st</sup> May 1902. The plaintiff was a spectator. The race was conducted under the authority of a resolution adopted by the board of alderman of the Borough of Richmond which purported to give permission to the Automobile Club of America to conduct the car race. During the race, the plaintiff was struck by a car which was racing in the race. At trial, the trial court directed a verdict against the defendants on the ground that the motorcar race was unlawful and a public nuisance. On review, the Appellate Division of the Supreme Court affirmed. The defendants appealed further to the Court of Appeals

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<sup>674</sup> Noted in *R v Howell* (1675) 3 Keb 465, 84 ER 826; *Jacob Hall's case* (1671) 1 Mod 76, 86 ER 744; and *Bates v District of Columbia* 1 MacArth 433 (1874), (1874) US App LEXIS 2098. In *Bates v District of Columbia*, Justin Olin described the case as, "a pretty summary proceeding, which in effect destroyed a man's property, and condemned him without trial or hearing, and yet the decision was in strict conformity to law,..." ((1874) US App LEXIS 2098 at para [4].

<sup>675</sup> 186 NY 139, 78 NE 715, Court of Appeals of New York (1906).

The Court of Appeals upheld the appeal and ordered a new trial finding that the question whether the contest as conducted was in fact a nuisance, whether the city or the race sponsors were guilty of negligence in the management of the race and the contributory negligence, if any, on the part of the spectator, were all questions of fact, which should have been submitted to the jury for determination. In upholding the appeal the court commented on the legality of the motorcar race on the facts of the case, concluding that a motorcar race on the streets of the city was a public nuisance *per se* and the purported license or authorization of the race by the City of New York was irrelevant to the determination that a public nuisance had occurred. Chief Justice Cullen, for the court, stated:

“The authority [of the city of New York] was to regulate public travel, not to exclude the public. Of course, in the congested condition of many of the streets of New York restrictions, possibly of a somewhat arbitrary character, are necessary to secure public passage along the highway; otherwise intolerable confusion would exist and the streets become blocked so that travellers could move in no direction. Such regulations are within the power of the municipal authorities... In those cases every member of the public has an equal right to share in the privileges granted in the street. There is no appropriation for a private use. The present case is radically different. The occupation of the highway was to be exclusive in the parties to whom the permission was granted. Therefore, the race or speed contest held by the defendants was an unlawful use and obstruction of the highway and *per se* a nuisance (Penal Code, s. 385, sub. 3.)”<sup>676</sup>

In a strikingly similar case, *Attorney-General v Blackpool Corporation*,<sup>677</sup> a local authority was restrained from using “The Parade”, a promenade for foot-passengers at Blackpool, for the purposes of a motor race. By a local Act passed in 1865 the corporation of Blackpool were authorized to make and maintain a carriage-drive and a promenade (called ‘the parade’) by the sea. The parade was used exclusively for foot passengers and pedestrians. Motor races

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<sup>676</sup> 186 NY 139 (1906) at p 146, followed *Attorney General (ex rel Pratt) v Brisbane City Council* (1988) 1 QdR 346 at p 353.

<sup>677</sup> (1907) 71 JP 478.

were held in 1904, 1905, and 1906, on this sea front. In each of the three years, the course used for racing was barricaded on both sides for a distance of over a mile and a half, and on each occasion the tramtrack was, for a portion of its length, closed for trams and used for motor cars. In 1906 the corporation gave their approval to motor car races being held on the parade, and gave permission for part of the tramway road to be used for the purpose of cars returning to the starting point. They also undertook to keep the portion of the parade over which the races were to be run clear of traffic, and to erect a barrier and provide the necessary police control. In all respects, the corporation acted in the same manner as local councils or municipal councils act in supporting contemporary public sporting events such as triathlon events and marathons.

Suit was brought by the Attorney-General, on relator of a ratepayer, for an injunction to restrain the corporation from organizing or promoting motor races on the sea front. The Attorney-General argued that the parade was a highway, and that racing upon it was an improper use at common law. It was also a breach of the Motor Car Act 1903 (UK), because the cars necessarily exceeded the speed limit. The erection of barricades caused obstruction, and constituted a nuisance at common law, and an offence against the Highway Act. And the collection of crowds and of motor cars waiting to start on the carriage-drive was also a nuisance which ought to be restrained. In defence to the action the local authority argued that: "Some latitude must be given to the corporation to allow its use for events causing public enjoyment, just as cricketers are allowed temporarily to monopolize portions of public parks..." The local government claimed "a bona fide use of a public work for a public purpose, viz the creation of an attraction in the off-season, and the advertisement of Blackpool."<sup>678</sup> It would be to these policy reasons which a contemporary local council or municipal council would appeal to justify their license of contemporary public sporting events such as triathlons and marathons which use the highway.

The Blackpool Corporation was found by the court to have taken an active part in the promotion of the motor race. They issued notices closing a portion of the parade and tramway to the public. They put up barriers and a grand stand, and the receipts of the grand stand were received by the corporation. The effect of what the corporation did was to

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<sup>678</sup> *ibid.*

exclude the public from the use of the parade for any purpose during certain hours on certain days, and to stop the tramway service during substantially the same periods. The Vice-Chancellor held that the corporation were in the position of trustees of the parade for limited public purposes, namely, for the purpose of use by foot passengers, perambulators, invalid carriages, and similar vehicles, and that it was an abuse of the parade to allow it to be used for either horses or motor cars, and a fortiori motor races.<sup>679</sup> The staging of a motor race was a public nuisance.

Public exhibitions of sport that utilise highways and public streets exclusive of the public generally, even for a limited time, are a public nuisance. Sporting events such as triathlon races, wherein thousands of professional and amateur triathletes cordon off the highway and use the highway for the cycling leg of the race create a common law public nuisance. The same is true of cycling races such as the *Tour Down Under* and of other professional or amateur criterion cycling events. Licenses by local authorities or local councils, as was the case in *Johnson v City of New York*,<sup>680</sup> and in *Attorney-General v Blackpool Corporation*,<sup>681</sup> will not be sufficient in law to make such a sporting event using public roads exclusive of the public lawful unless there exists unambiguous legislation in clear terms granting power to a local authority to license a public nuisance. The only means of making lawful the appropriation of public roads for the exclusive use of a sporting event is legislation through Parliament, the effect of which is to change the common law position.<sup>682</sup>

It is probable that events such as the annual Noosa Triathlon and the Mooloolaba Triathlon in Queensland, where the highways and public streets are appropriated for the bicycle and running legs of the race, exclusive of the public, are creating a public nuisance. During the races, barriers are erected, traffic cones are placed on the roads, cars lawfully parked in the street are towed away, and police and marshals stop members of the public from driving along the public roads, walking along the public thoroughfares, or using the canals or beaches or parks for recreation. Grandstands and elite private corporate boxes for the management and for sponsors of the triathlon event are constructed on the public footpaths

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<sup>679</sup> *ibid* at p 480.

<sup>680</sup> 186 NY 139, 78 NE 715, Court of Appeals of New York (1906).

<sup>681</sup> (1907) 71 JP 478.

<sup>682</sup> See further the discussion in Part 4, Chapters 14 and 15, below.

adjoining the road. A pedestrian is not able to utilize his public right to use of the public footpath. These buildings, built on the public highway, are also a public nuisance being an obstruction of the highway. The roads which are closed also obstruct residents of homes in the towns of Noosa, Mooloolaba, and Alexandra Headland, where the triathlon races are staged, who are unable to leave their homes by vehicle during the conduct of the race. In such circumstances the residents of these communities are sufficient in number to constitute the “public” against whom a public nuisance is committed. It is sufficient, as a matter of law if the nuisance affects only seven families,<sup>683</sup> or sixteen households,<sup>684</sup> or thirty households.<sup>685</sup>

Other sports events, such as marathon running events, fun run events, and cycling events also use the public highways exclusive of the public. Such events take place annually, as evidenced by the Gold Coast Marathon, which is run on the public highways of the Gold Coast, Queensland. During the Gold Coast Marathon the roads are cordoned off to vehicles and to the public for several hours and residents of the scores of apartment buildings adjacent the public highways used for the marathon race are obstructed in leaving their homes by vehicles. There is no legislation of the Queensland Parliament which authorises the appropriation of the public highway for the *exclusive* use of the race organisers or sponsors of either of these triathlon or marathon events in Queensland. Nor is there any legislation of the Queensland Parliament which empowers a local council to issue a license permitting the appropriation of a public highway for their exclusive use. The Race organisers of sports such as the Noosa Triathlon and the Gold Coast Marathon invariably obtain a license from a local council, and pay a fee to the local council for such license, to make use of a public highway. But these licenses, issued by local councils under their care and management responsibilities under Local Government Acts (such as sections 28, 60 and 69 Local Government Act 2009 (Qld)),<sup>686</sup> are insufficient in law to authorise race organisers to commit a public nuisance. The decisions in *Johnson v City of New York* and *Attorney-General*

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<sup>683</sup> *Attorney General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (British Columbia Supreme Court).

<sup>684</sup> *Bathurst City Council v Saban (No 2)* (1986) 58 LGRA 201 (Supreme Court of New South Wales, Equity Division, 13 March 1986) BC8601183 at 5.

<sup>685</sup> *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169, [1957] 1 All ER 894.

<sup>686</sup> Section 60 empowers a local government to ‘regulate’ the use of vehicles on local roads. And, consistent with its powers to ‘regulate’ roads, section 69 empowers a local government to close a road (permanently or temporarily) to traffic or particular traffic, if there is another road or route reasonably available for use by the traffic.

*v Blackpool Corporation*, confirm that a local authority does not have power to license the appropriation of a public highway for a sporting event unless there is legislation which explicitly empowers that local authority to change the common law and to license the commission of what amounts to a common law public nuisance obstructing the public in the exercise of their right of way on the highway.

There is a difference in the application of the common law of public nuisance to public sporting events which take place at public places, such as beaches, parks and public highways compared with public sporting events which take place in sports stadiums which are owned by individual persons, sports clubs, corporations, or governments. Whilst sports events held at stadia might create a public nuisance indirectly by drawing crowds to the stadia which leads to obstruction of the public's right to unfettered use of the highway or inconvenience to the public, by obstructing access to and egress from adjoining premises, discussed below, sports events that are staged in public places such as beaches, parks and public highways are nuisances not only because they may draw crowds, but principally because they appropriate a public place for their own *exclusive* use and personal profit, albeit for a limited period of time. In so doing, the sports event, operated by a private company or private sports association, interferes with or obstructs the public in the exercise of their immutable public right to use of, enjoyment of, or movement along, public places.

An obstruction of the highway, if unreasonable, is a public nuisance in itself.<sup>687</sup> It is not every obstruction of the highway which constitutes a public nuisance. The obstruction must be unreasonable. Permanent obstruction erected on the highway without lawful authority unavoidably constitutes a public nuisance because it amounts to a removal of a part of the highway from public use. A temporary obstruction of the highway may be lawful if it is slight in point of time, or brought about by the reasonable and lawful use of the highway as a highway.<sup>688</sup> So, for example, it is not a public nuisance to temporarily obstruct the highway by causing a car to stop on the road for the purpose of discharging passengers or goods.<sup>689</sup> But such use of the highway, or obstruction of the highway, must be temporary and without

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<sup>687</sup> See further RVF Heuston & RA Buckley *Salmond & Heuston on the Law of Torts* (20<sup>th</sup> edn Sweet & Maxwell London 1992) at pp 87 and 89.

<sup>688</sup> *ibid* at pp 90 and 91, citing *Buck v Briggs Motor Bodies Ltd* (1959) *The Times*, April 18.

<sup>689</sup> *Trevett v Lee* [1955] 1 WLR 113 at p 118.

delay. Stoppage in the street must be prompt.<sup>690</sup> The use of highways by public exhibitions of sporting events where professional sporting organizations and professional athletes make use of the highway *exclusive of the public* making money through prize money and television sponsorship is very different from these cases of temporary obstruction of the highway. And we may understand by analogy to the caselaw on this point – such as *Johnson* and *Blackpool Corporation* – that the use of other public spaces such as public beaches and parks by public exhibitions of sporting events where professional sporting organizations and professional athletes make use of the highway *exclusive of the public* similarly creates public nuisances.<sup>691</sup> The exclusive use of public highways, parks, or beaches, is an *appropriation* for a temporal period exclusive of public rights to use of, and enjoyment of, the public highway, park or beach in question. An appropriation of a public way for an exclusive use by a private entity, such as a sports association, a sports club, or a sports promoter, for a short period of time, such as for part of the day on a Sunday, *is* an unreasonable obstruction of the public way and *per se* a nuisance.<sup>692</sup> In *Johnson v City of New York*, the Court of Appeals of New York held that the use of the public streets in New York for a motor vehicle race on a Sunday afternoon amounted to a public nuisance *per se* because the use was exclusive of the public.<sup>693</sup>

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<sup>690</sup> Lord Ellenborough's comment in *R v Jones* 3 Camp 230, where it was held to be an indictable offence for a timber merchant to cut logs of timber in the street adjoining his timber-yard, is dispositive. His Lordship said: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway; but this must be done with promptness." (cited in *Barber v Penley* [1893] 2 Ch 447 at p 450).

<sup>691</sup> *Johnson v City of New York* 186 NY 139, 78 NE 715, Court of Appeals of New York (1906) at p 146 of the former report. *Attorney-General v Blackpool Corporation* (1907) 71 JP 478 at p 480. On case law concerning nuisance of beaches and foreshores, note the judgment of *Corporation of Hastings v Ivall* [1871] 19 LR Eq 558, where Sir R Malins V-C said of the defendants claim to an "...absolute and uncontrolled liberty of depositing any quantity of earth or rubbish on the beach, and where, when, and as he thinks proper, [it] is, in my opinion, most unreasonable and unsustainable." Note, similarly *Southport Corporation v Esso Petroleum Co Ltd* [1954] 2 QB 182, [1954] 2 All ER 561 (CA), where, on the question of nuisance, Denning LJ said at p 571: "Applying the old cases to modern instances, it is, in my opinion, a public nuisance to discharge oil into the sea in such circumstances that it is likely to be carried onto the shores and beaches of our land to the prejudice and discomfort of Her Majesty's subjects. It is an offence punishable by the common law." The judgment of the Court of Appeal was reversed by the House of Lords, [1955] 3 All ER 864. Although the issues of trespass and nuisance were not considered by it, Lord Radcliffe did say he agreed with Denning LJ's views on the question of nuisance.

<sup>692</sup> *Johnson v City of New York* 186 NY 139, 78 NE 715, Court of Appeals of New York (1906) at p 146 of the former report. *Attorney-General v Blackpool Corporation* (1907) 71 JP 478.

<sup>693</sup> *ibid.*

The exclusive use of public highways for sports events by private entities (such as sports clubs, sports associations, or sports promoters) for the limited duration of a sports event, is different from case law where an obstruction is caused by a motor vehicle standing on the road for an unreasonable time or in an unreasonable manner because, in those circumstances, the highway is not cordoned off for exclusive use, but is merely obstructed by a motor vehicle stopped on the road.<sup>694</sup> In such cases, vehicles and pedestrians can take an alternate route during the short time period when the road is obstructed. Such use is also different from the case law on picketing on the public highway; for it cannot be a nuisance for a number of people to use the highway jointly and contemporaneously, for that is just what the highway is made for.<sup>695</sup> Triathlon races such as the Byron Bay Triathlon in Australia and the Windsor Triathlon in England, where the public highways are not cordoned off for the exclusive use of most of the bicycle leg of the race, and the competitors must share the road for the bicycle leg of the race with cars, may not create an unreasonable use of the highway and may thus not amount to a public nuisance. The same cannot be said of the run leg of these races, however, where the public roads are cordoned off, or for other triathlon races such as at Noosa or Mooloolaba, in Queensland, which use the public highway exclusively for several hours, erecting barriers and traffic cones along the roads and footpaths and engaging marshals and volunteers to prevent members of the public from exercising their right to free travel along the road or footpath. In such circumstances there is no option of taking alternate routes during the race. The whole highway is cordoned off. No part of the highway is shared. Following the decision in *Johnson v City of New York*,<sup>696</sup> and *Attorney-General v Blackpool Corporation*,<sup>697</sup> such public sporting events as triathlons and marathons are public nuisances at common law.

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<sup>694</sup> RVF Heuston & RA Buckley *Salmond & Heuston on the Law of Torts* (20<sup>th</sup> edn Sweet & Maxwell London 1992) at p 88, citing *Chesterfield Corporation v Arthur Robinson (Transport) Ltd* (1955) 106 LJ (News) 61. Note also *R v Cross* (1812) 3 Camp 244, where Lord Ellenborough, in reference to coaches stationed in the streets, said at p 246: "Is there any doubt if coaches on the occasion of a rout, wait an unreasonable length of time in the public street, and obstruct the transit of His Majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause and permit such coaches so to wait are guilty of a nuisance?" Then he says: "A stage coach may set down or take up passengers in the street, this being necessary for public convenience: but it must be done in a reasonable time; and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another."

<sup>695</sup> *ibid*, citing *Johnson v Kent* (1975) 132 CLR 164 at p 176.

<sup>696</sup> 186 NY 139, 78 NE 715, Court of Appeals of New York (1906).

<sup>697</sup> (1907) 71 JP 478, followed *Attorney General (ex rel Pratt) v Brisbane City Council* (1988) 1 QdR 346 at p 353.



The facts of *Bird v Jones*,<sup>698</sup> are pertinent in demonstrating how the law of public nuisance might apply to sports events where parts of the highway are obstructed, although in that case it was claimed that the plaintiff was falsely imprisoned. He did not proceed on a claim in public nuisance. In that case, Williams J outlined the facts at page 670, as follows: “A part of Hammersmith Bridge, which is generally used as a public footway, was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage way by a temporary fence. The plaintiff insisted upon passing along the part so appropriated, and attempted to climb over the fence. The defendant (clerk of the Bridge Company) pulled him back; but the plaintiff succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway in the direction he wished to go. The plaintiff, however, was at the same time told that he might go back into the carriage way and proceed to the other side of the bridge, if he pleased. The plaintiff refused to do so, and remained where he was so obstructed, about half an hour.” The plaintiff failed in his action for false imprisonment. But the plaintiff might have had a better case if he had argued the obstruction of the footpath created a public nuisance because the footpath was appropriated for the exclusive use of the spectators to the regatta.

In *R v Cross*,<sup>699</sup> a case involving the appropriation of a part of the public road, six or seven stage coaches drew up at a place on the highway near Charing Cross in London and parked in a row close to the curb side. They remained on the road for about three-quarters of an hour. This practise continued twice a day each day. Lord Ellenborough CJ held this was a public nuisance. His Lordship said: “...[E]very unauthorised obstruction of a highway to the annoyance of the King’s subjects is an indictable offence... The King’s highway is not to be used as a stableyard.”<sup>700</sup> Another way of phrasing such dicta is; the King’s highway is not to be used by private entities for their personal or exclusive benefit. What the court viewed to be a public nuisance was the situation of a corporate entity making use of public

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<sup>698</sup> (1845) 7 QB 742, 115 ER 668. Only Lord Denman CJ, in his dissenting judgment, at page 671 of the record, correctly identified a public nuisance liability, stating that: “A company unlawfully obstructed a public way for their own profit, extorting money from passengers, and hiring policemen to effect this purpose. The plaintiff, wishing to exercise his right of way, is stopped by force, and ordered to move in a direction which he wished not to take.”

<sup>699</sup> (1812) 3 Camp 244.

<sup>700</sup> *ibid* at p 246.

place for their own profit ignoring and disrespecting public rights to use of the public highway. Public sporting events such as triathlons and cycling races appropriating public spaces such as highways, public parks and public beaches may be viewed as ignoring and disrespecting public rights to use of the public space.

### 3. Publicly exhibited sporting events creating obstruction or inconvenience indirectly

Public exhibitions of sport may not only create an obstruction or inconvenience to the public directly by appropriating public spaces such as highways, public parks or public beaches for their exclusive use, but may create obstruction or inconvenience to the public indirectly by drawing crowds of spectators to witness the sporting event. These crowds may obstruct the highway or cause inconvenience to the public in the use of the highway or of other public spaces. And as was highlighted in Chapter 7 of this thesis, it is the promoters or organizers of the public sporting event, and not the individual members of the crowd drawn to witness the public sporting event, who are answerable for the public nuisance. The principal judgment supporting the principle that the attractor of a crowd to the highway is liable for a public nuisance is *Lyons, Sons & Co v Gulliver*, where the court states: "...a man is or may be liable to an indictment for attracting, even by something lawfully done on his own premises, a crowd in the street adjoining his premises."<sup>701</sup> In that case the plaintiffs were entitled to relief against the defendants, who were proprietors of the Palladium Theatre, in respect of a nuisance caused by a queue formed twice daily by people going to the defendant's theatre. The queue extended for a considerable distance in front of the plaintiffs' place of business and was extant for considerable periods of time. In consequence of the queue access to the plaintiffs' adjacent shop was obstructed and the plaintiff lost business. The Court of Appeal held, per Cozens-Hardy MR and Swinfen Eady LJ, Phillimore LJ dissenting, that the obstruction of access to the plaintiffs' shop caused by the crowd of theatregoers was an actionable nuisance, the obstruction of the highway (in this case the footpath) being a public nuisance. Consequent to this public nuisance the plaintiffs

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<sup>701</sup> [1914] 1 Ch. 631 at p 642 (Cozens-Hardy MR).

were affected specially. The defendants were liable to be restrained by injunction and the failure of the police to prevent the obstruction by regulating the crowd and keeping proper gaps for the passage of the public through the queue was no defence. When a person uses a highway otherwise than for passage and attracts a crowd which congregates and ceases to use the highway for passage, the congregation may result in a public nuisance for which the attractor may be liable: *Johnson v Kent*.<sup>702</sup>

Spectators, accumulated on the public highway, to observe a show or a sporting event, even for a short period of time, create a public nuisance by unreasonable obstruction. In *Shaw's Jewelry Shop Inc v New York Herald Co*,<sup>703</sup> a public nuisance was created when crowds were drawn to the premises of the New York Herald where a baseball 'playograph' was exhibited. The 'playograph' was a large screen or board on which a baseball game was recreated from telegraph reports from the press box at the game. In *R v Carlisle*,<sup>704</sup> it was held that if a person exhibits effigies, or puppets, at his windows and thereby attracts a crowd to look at them, which causes the footway to be obstructed so that the public cannot pass as they ought to do, this is an indictable nuisance. It is not essential that the effigies should be libellous, and, *semble*, it is not necessary to show that the crowd consisted of idle, disorderly, and dissolute persons.

Further, as was held in *Dewar v City and Suburban Race Course Co*,<sup>705</sup> the inconvenience caused to residents of a local community where a public exhibition of sport occurs, in being unable to move freely from their home along the public roads, is a public nuisance at common law. In *Dewar* horserace meetings held on Sundays were held to be a nuisance because the sport create a discomfort to inhabitants of the neighbourhood, by the shouting and cheering of the crowds collected on the course, and by the cries of the bookmakers, and by the noise of crowds going to and from the racetrack,<sup>706</sup> **and because the sport created an obstruction of the thoroughfares leading to the racetrack by vehicles conveying persons to and from the races, and by vehicles drawn up near the racecourse waiting for fairs.** An

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<sup>702</sup> [1975] HCA 4, (1975) 132 CLR 164 at p 174 (Jacobs J, obiter).

<sup>703</sup> 170 AD 504, 156 NYS 651 (NY App Div 1915), affirmed by the New York Court of Appeals, 224 NY 731, 121 NE 890 (1918).

<sup>704</sup> (1834) 6 Car & P 636.

<sup>705</sup> [1899] 1 IR 345.

<sup>706</sup> See further Chapter 9, below.

injunction was granted to restrain horseraces from being held on Sundays on a racecourse adjoining a residential locality. In granting an injunction to restrain the defendant company from conducting horseraces on their racecourse the court noted, “the many different inconveniences suffered by them from the races, the noise of shouting, cries of bookmakers, trespasses to their gardens and walls by persons scrambling for places of view, **obstruction to the roads and streets by cars and carriages drawn up waiting for fares**, crowds outside the racecourse as well as inside it, persons staring in at their back windows looking upon the racecourse, rude remarks by persons inside and outside the course, tables for roulette and other gambling, throwing of empty bottles into their gardens, and other matters...”<sup>707</sup>

It is important to appreciate, again, here, that an obstruction or inconvenience to public rights, created by the staging of a sporting event in a public place, does not have to effect hundreds or thousands of people. It is sufficient, as a matter of law if the nuisance affects only seven families,<sup>708</sup> or sixteen households,<sup>709</sup> or thirty households.<sup>710</sup> A sporting event which is staged on public roads, or public beaches, such as a triathlon race, a road cycling race, or a marathon, need only create an obstruction or inconvenience to as few as seven households. It is sufficient if the nuisance is indiscriminate in its’ operation affecting a relatively small number of persons. The Noosa Triathlon, which utilises the public highways in and about Noosa and Noosaville for the exclusive use of the participants in the race, obstructs and causes inconvenience to more than seven households. During the race a great number of residents are prevented from leaving their own homes by vehicle for several hours because the whole of the highway adjacent to their premises is closed for the race. There is no facility to drive a vehicle out of one’s own driveway, let alone to drive on the road outside one’s own home. The same occurs at several other sports competitions which utilise the public highway, such as the Gold Coast marathon, for example. These public exhibitions of sporting events by causing obstruction or inconvenience to the public in the

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<sup>707</sup> *ibid* at p 353 (emphasis added).

<sup>708</sup> *Attorney General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (British Columbia Supreme Court).

<sup>709</sup> *Bathurst City Council v Saban (No 2)* (1986) 58 LGRA 201 (Supreme Court of New South Wales, Equity Division, 13 March 1986) BC8601183 at 5.

<sup>710</sup> *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169, [1957] 1 All ER 894.

exercise of a public right to use of the public spaces where the public sporting event is staged are public nuisances at common law.

#### 4. The nature of the public right of way

The term ‘public right of way’ suggests that persons have an indubitably established right to use the highway for passing and repassing. Yet, the types of activities which the courts have recognized as encompassed within the public right of way are not limited to passage only. Various historical decisions are divided between those which take a narrow view of the right of way and those which take a broad view.<sup>711</sup> If a narrow view of the public right of way is adopted the rights of members of the public extend only to those things incidental to passage.<sup>712</sup> As Lord Irvine noted in *DPP v Jones* of the judgments of Lopes and Kay LJ in *Harrison v Duke of Rutland* [1893] 1 QB 142: “The rigid approach of Lopes LJ and Kay LJ would have some surprising consequences. It would entail that two friends who meet in the street and stop to talk are committing a trespass; so too a group of children playing on the pavement outside their homes; so too charity workers collecting donations; or political activists handing out leaflets; and so too a group of members of the Salvation Army singing hymns and addressing those who gather to listen.”<sup>713</sup> If a broad view is adopted members of the public are entitled to make reasonable use of the public ways.

It is beyond the purposes of this thesis to here discuss the distinction between the three categories of ‘highway’ at common law – footpaths, bridleways and cartways – and the

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<sup>711</sup> See *R v Pratt* (1855) 4 E & B 860 at pp 868-869: “I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser.” (Crompton J). *Ex parte Lewis* (1888) 21 QBD 191, where Wills J said that a public right of passage is a “right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance.” *DPP v Jones* [1999] UKHL 5, [1999] 2 WLR 625 at pp 638-39 (Lord Slynn of Hadley, dissenting). cf *Hickman v Maisey* [1900] 1 QB 752; *DPP v Jones* [1999] UKHL 5, [1999] 2 WLR 625 at pp 631-32 (Lord Irvine of Lairg LC).

<sup>712</sup> JF Clerk and WHB Lindsell *Clerk & Lindsell, The Law of Torts* (18<sup>th</sup> edn Sweet and Maxwell London 2000) paras [17]-[41], p 861, viz: “The right of the public in respect of a highway is limited to the use of it for the purpose of passing and repassing and for such other reasonable purposes as it is usual to use the highway; if a member of the public uses it for any other purpose than that of passing and repassing he will be a trespasser.”

<sup>713</sup> [1999] UKHL 5, [1999] 2 WLR 625 at p 630 (Lord Irvine of Lairg LC) citing *Harrison v Duke of Rutland* [1893] 1 QB 142 at p 154 (Lopes LJ) and at p 158 (Kay LJ) viz: “. . . the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass.”

consequences flowing from using a category of highway in a manner inconsistent with its designation.<sup>714</sup> The riding of bicycles on footpaths may be either lawful or unlawful at common law or under statute.<sup>715</sup> It is sufficient for the analysis of the nature of the public right of way to rest on those activities consistent with the category of highway and consistent with statute. Courts have accepted that a right of passage once acquired will extend to more modern forms of traffic reasonably similar to those for which the highway was originally dedicated provided that any new form of traffic neither significantly increase the burden on the owner of the soil, nor markedly inconveniences persons exercising the right of passage in the manner originally envisaged.<sup>716</sup> Where the mode of passage is consistent with the category of highway, the courts have stated that the public may use the highway either “for all purposes”,<sup>717</sup> or only “for legitimate purposes”.<sup>718</sup> However, in the Scottish case of *Wills’ Trustees v Cairngorm Canoeing and Sailing School Ltd*, the House of Lords disapproved of the various rules laid down as to “purpose”, stating that it was “most unattractive” for the courts to be examining the intentions of persons exercising their right of passage.<sup>719</sup> Lord Wilberforce stated: “once a public right is established, there is no warrant for making any distinction, or even for making any enquiry, as to the purpose for which the right is

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<sup>714</sup> See *ibid* at pp 47-53. See also *Attorney-General (ex rel Pratt) v Brisbane City Council* (1988) 1 Qd R 346 at p 352 (McPherson J): “At common law, ways were subject to a threefold classification of footways, bridleways, and cartways or carriageways: see *Co Litt* 56a. The first of these were for use by pedestrians only. See Woolrych ‘Law of Ways’ (1847), at 1... The use of the word ‘pathway’ in the plan seems to me to be consistent only with an intention that the strip should be used exclusively by foot-passengers... It follows that, being exclusively for foot-passengers, use of the strip or pathway for vehicular traffic is a use of it contrary to the purpose for which it was dedicated. Any excessive or unauthorized use of a public way is a public nuisance at common law and may be restrained at the suit of the Attorney-General. There were, and still are, several different kinds of proceedings available for this purpose. One was by indictment for public nuisance, which was a common law misdemeanour: see now s.230 of the Criminal Code; another by proceedings for an injunction: see Woolrych [‘Law of Ways’ (1847)], at 423-424; another by prerogative writ of mandamus against a person subject to a public duty to keep the highway open and in repair...”

<sup>715</sup> The riding of a bicycle is not analogous to passage on foot because of the use of a vehicle, namely a bicycle. Consequently, it is not lawful to ride a bicycle on a footpath at common law: see *Brotherton v Tittensor* (1896) 60 JP 49-50; *R v Pratt* (1867) LR 3 QB 64; *Rodgers v Ministry of Transport* (1952) 1 TLR 625 at p 627 (Lord Goddard CJ). Note eg that pursuant to s 72 of the Highways Act 1835 (UK) as amended by s 85 (1) of the Local Government Act 1888, it is an offence to ride a bicycle on the footpath. cf Rule 250 of the Road Rules of Victoria, Australia, gazetted pursuant to Road Safety (Road Rules) Regulations 1999 (Vic) which states that a rider of a bicycle who is under the age of 12 years of age may lawfully ride a bicycle on a footpath.

<sup>716</sup> *Case v Midland Railway Co* (1859) 27 Beav 247, 54 ER 96; and *R v Mathias* (1861) 2 F & F 570, 175 ER 1191. These cases concerned, respectively, a steamboat on a canal and a pram on a footpath.

<sup>717</sup> *Rouse v Bardin* (1790) 1 H Bl 351, 126 ER 206 (Wilson J).

<sup>718</sup> *R v Pratt* (1855) 4 El & Bl 860 at p 868, 119 ER 319; *Hubbard v Pitt* [1976] QB 142 at p 175 (Lord Denning). Also *Allen v Flood* [1898] AC 1 at p 20 (Hawkins J); *Lord Fitzhardinge v Purcell* [1908] 2 Ch 130 at pp 167-68 (Parker J); and *Randall v Tarrant* [1955] 1 All ER 600 at p 603 (Evershed MR).

<sup>719</sup> (1976) SLT 162 (House of Lords) at p 203 (Lord Hailsham).

exercised”; for “one cannot stop a canoe, any more than one can stop a pedestrian on a highway, and ask him what is the nature of his use.”<sup>720</sup>

In *Harrison v Duke of Rutland*, Lord Esher MR plainly contemplated that there may be ‘reasonable’ or ‘usual’ uses of the highway as a right of way beyond mere passing and repassing. At page 146 His Lordship stated: “Highways are, no doubt, dedicated *prima facie* for the purpose of passage; but things are done upon them by everybody which are recognized as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser.”<sup>721</sup>

The House of Lords in *DPP v Jones*,<sup>722</sup> by majority, adopted a broad view as to the scope and context of the lawful use of the highway applying the judgments of Lord Esher in *Harrison v Duke of Rutland*,<sup>723</sup> and of Collins LJ in *Hickman v Maisey*.<sup>724</sup> The facts in *DPP v Jones* concerned a protest at Stonehenge in England and raised a very clear question on appeal: “[This] appeal raises an issue of fundamental constitutional importance: what are the limits of the public’s rights of access to the public highway? Are these rights so restricted that they preclude in all circumstances any right of peaceful assembly on the public highway?”<sup>725</sup> The House of Lords held that the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the public’s primary right to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway. Lord Irvine, giving the principal judgment, stated:

“[T]he judgments of Lord Esher MR and Collins LJ are authority for the proposition that the public have the right to use the public highway for such reasonable and usual activities as are consistent with the general public’s primary right to use the highway for purposes of passage and

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<sup>720</sup> *ibid* at p191 (Lord Wilberforce).

<sup>721</sup> [1893] 1 QB 142 at p 146, applied *DPP v Jones* [1999] UKHL 5, [1999] 2 WLR 625 at p 629 (Lord Irvine of Lairg).

<sup>722</sup> [1999] UKHL 5, [1999] 2 WLR 625.

<sup>723</sup> [1893] 1 QB 142 at p 146 (Lord Esher MR).

<sup>724</sup> [1900] 1 QB 752 at pp 757-8 (UK CA).

<sup>725</sup> [1999] 2 WLR 625 at p 629 (Lord Irvine of Lairg LC).

repassage... If the right to use the highway extends to reasonable user not inconsistent with the public's right of passage, then the law does recognize, (and has at least since Lord Esher's judgment in *Harrison* recognized), that the right to use the highway goes beyond the minimal right to pass and repass. That user may in fact extend, to a limited extent, to roaming about on the highway, or remaining on the highway. But that is not of the essence of the right. That is no more than the scope which the right might in certain circumstances have, but always depending on the facts of the particular case.<sup>726</sup>

In discussing the scope of a 'reasonable and usual' mode of using the highway as a right of way, Lord Irvine declared:

"I do not, therefore, accept that, to be lawful, activities on the highway must fall within a rubric incidental or ancillary to the exercise of the right of passage. The meaning of Lord Esher's judgment in *Harrison*, at pp 146-147 is clear: it is not that a person may use the highway only for passage and repassage and acts incidental or ancillary thereto; it is that any 'reasonable and usual' mode of using the highway is lawful, provided it is not inconsistent with the general public's right of passage. I understand Collins LJ's acceptance in *Hickman*, at pp. 757-758, of Lord Esher's judgment in *Harrison* in that sense...

Nor can I attribute any hard core of meaning to a test which would limit lawful use of the highway to what is incidental or ancillary to the right of passage. In truth very little activity could accurately be described as 'ancillary' to passing along the highway; perhaps stopping to tie one's shoe lace, consulting a street-map, or pausing to catch one's breath. But I do not think that such ordinary and usual activities as making a sketch, taking a photograph, handing out leaflets, collecting money for charity, singing carols, playing in a Salvation Army band, children playing a game on the pavement, having a picnic, or reading a book, would qualify.

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<sup>726</sup> *ibid.*



These examples illustrate that to limit lawful use of the highway to that which is literally ‘incidental or ancillary’ to the right of passage would be to place an unrealistic and unwarranted restriction on commonplace day-to-day activities. The law should not make unlawful what is commonplace and well accepted.”<sup>727</sup>

Lord Clyde concurred with Lord Irvine, applying the dicta of Lord Esher in *Harrison* and Collins LJ in *Hickman* alike. Discussing *Harrison* and *Hickman* at length, Lord Clyde stated:

“The fundamental purpose for which roads have always been accepted to be used is the purpose of travel, that is to say, passing and re-passing along it. But it has also been recognized that the use comprises more than the mere movement of persons or vehicles along the highway. The right to use a highway includes the doing of certain other things subsidiary to the user for passage. It is within the scope of the right that the traveller may stop for a while at some point along the way. If he wishes to refresh himself, or if there is some particular object which he wishes to view from that point, or if there is some particular association with the place which he wishes to keep alive, his presence on the road for that purpose is within the scope of the acceptable user of the road. The view was expressed by AL Smith LJ, in *Hickman v Maisey* [1900] 1 QB 752, 756, that if a man took a sketch from the highway no reasonable person would treat that as an act of trespass. So as it seems to me the particular purpose for which a highway may be used within the scope of the public’s right of access includes a variety of activities, whether or not involving movement, which are consistent with what people reasonably and customarily do on a highway...

On the other hand the purpose for which the road is used must be for ordinary and lawful uses of a roadway and not for some ulterior purpose for which the road was not intended to be used. Thus in the case of

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<sup>727</sup> [1999] 2 WLR 625 at p 631 (Lord Irvine). Lord Clyde (at pp 653-54) and Lord Hutton (at pp 664-65) similarly approve of the judgments of Lord Esher in *Harrison* and Collins LJ in *Hickman*.

*Hickman v Maisey* to which I have already referred, it was held to be a trespass for someone to use the road as a vantage point for observing the performance of racehorses undergoing trial. To use the language of Collins LJ (at p 758) that was a use of the highway ‘in a manner which is altogether outside the purpose for which it was dedicated.’”<sup>728</sup>

In *Hickman v Maisey* [1900] 1 QB 752 AL Smith LJ expressly followed the approach of Lord Esher MR in *Harrison*. Applying that reasoning, he accepted, at page 756, that a man resting at the side of the road, or taking a sketch from the highway, would not be a trespasser. The defendant’s activities, which comprised of remaining on the highway to observe racehorses being trained on the plaintiff’s land, however, fell outside “an ordinary and reasonable user of the highway” and so amounted to a trespass. Collins LJ similarly approved Lord Esher’s approach, noting that:

“... in modern times a reasonable extension has been given to the use of the highway as such . . . The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognized as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilized, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage.”<sup>729</sup>

What is reasonable or usual may develop and change from one period of history to another;<sup>730</sup> but the fundamental principle remains that any use of the highway must be consistent with the paramount idea that the right of the public is that of passage. All use of the highway is lawful only insofar as it does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass.<sup>731</sup> Members of the public are entitled to use public rights of way for activities which have no relation to passage, so long as the relevant conduct is otherwise

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<sup>728</sup> *ibid* at pp 653-54.

<sup>729</sup> [1900] 1 QB 752 at pp 757-58.

<sup>730</sup> [1999] 2 WLR 625 at p 655 (Lord Clyde).

<sup>731</sup> [1999] 2 WLR 625 at p 631 (Lord Irvine).

lawful and reasonable and provided that such activity does not ‘occupy’ the highway in a way inconsistent with its primary use for passage. Lord Clyde, speaking in *DPP v Jones*, warned that any action on the highway which has the effect of occupying the highway is not congruous with the public right of way. Lord Clyde said: “The test then is not one which can be defined in general terms but has to depend upon the circumstances as a matter of degree. It requires a careful assessment of the nature and extent of the activity in question. If the purpose of the activity becomes the predominant purpose of the occupation of the highway, or if the occupation becomes more than reasonably transitional in terms of either time or space, then it may come to exceed the right to use the highway.”<sup>732</sup>

The public may make use of their public right of way on the highway for many activities unconnected with passage, including, for sketching (as suggested by Lord Justice Smith in *Hickman v Maisey*),<sup>733</sup> for bird-watching,<sup>734</sup> for picnics,<sup>735</sup> and reading a book.<sup>736</sup> The playing games by children, on a footpath adjacent their home, would also likely be a lawful use of the highway.<sup>737</sup> The public might not use the highway in any manner which seeks to occupy the highway, however, and so using the highway for staging a publicly exhibited sporting event would be incongruous with the right of way, and using the highway to spectate sporting events such as horseracing would be similarly unlawful as was held in *Hickman v Maisey*. Other activities which would be consistent with the right of way might include recreational activities such as jogging, provided that such jogging is not unlawful pursuant to statute,<sup>738</sup> or cycling, provided that such cycling is not unlawful pursuant to statute.<sup>739</sup>

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<sup>732</sup> *ibid* at p 655.

<sup>733</sup> [1900] 1 QB 752 at p 756; *DPP v Jones* [1999] 2 WLR 625 at p 631 (Lord Irvine).

<sup>734</sup> See T Bonyhady *The Law of the Countryside, The Rights of the Public* (Professional Books Abingdon 1987) at p 57.

<sup>735</sup> *ibid*, by analogy with *Rodgers v Ministry of Transport* [1952] 1 TLR 625; *DPP v Jones* [1999] 2 WLR 625 at p 631 (Lord Irvine).

<sup>736</sup> *DPP v Jones* [1999] 2 WLR 625 at p 631 (Lord Irvine).

<sup>737</sup> *ibid*.

<sup>738</sup> Note eg following r 238 Transport Operations (Road Use Management – Road Rules) Regulation 1999 (Qld) it is unlawful to run or jog on a road if there is a footpath or nature strip adjacent to the road. The infringer is liable to a fine of \$2,000.00 (pursuant to s 5 Penalties and Sentences Act 1992 (Qld)). Note also r 238 Road Rules Victoria, gazetted pursuant to the Road Safety (Road Rules) Regulation 1999 (Vic) which similarly states that a pedestrian must not travel along a road if there is a footpath or nature strip adjacent to the road. The penalty for infringement is \$113.42 in the 2008-09 financial year (1 July 2008 to 30 June 2009 pursuant to s 5(3) Monetary Units Act 2004 (Vic)).

<sup>739</sup> Note eg that pursuant to s 72 of the Highways Act 1835 (UK) as amended by s 85 (1) of the Local Government Act 1888, it is an offence to ride a bicycle on the footpath, attracting a fine of £500.00.

Publicly exhibited sporting events may thus create public nuisances if they obstruct or inconvenience the public not only when the public is using the highway for their motorcars, but also, and perhaps more importantly, when the public is using the highway for walking, meeting or accosting fellow residents or strangers, jogging, cycling, or sketching. The only type of activity which would not be capable of being impinged by a publicly exhibited sporting event creating a public nuisance would be an activity which is declared unlawful when practised on the highway by statute. One example of this is that it is unlawful to play games on the highway. For example, pursuant to section 161(3) of the Highway Act 1980 (UK) it is an offence for a person to play football or any other game on a highway to the annoyance of a user of the highway;<sup>740</sup> and in Queensland, rule 151(2) of the Traffic Regulation 1962 (Qld) provides that it is unlawful to play or take part in any game on any road in Queensland.

## 5. Concluding remarks

A publicly exhibited sporting event may create a public nuisance either directly or indirectly. Directly, the sporting event may appropriate the highway or some other public place such as a public park or a public beach for the exclusive use of the participants in the sporting event. The sporting event may erect barriers, stands, VIP marquees. These acts by the organizers or promoters of the public sporting event obstruct the public in the exercise of public rights to use of the highway or use of the public space, or may cause inconvenience to the public. The sporting event is thus a public nuisance at common law. Indirectly, the sporting event may draw crowds of spectators. These crowds may obstruct the public in the exercise of public rights to use of the highway or use of the public space, or may cause inconvenience to the public in the exercise of their public rights. The sporting event is thus a public nuisance at common law. Popular modern publicly exhibited sporting events such as marathons, triathlons, cycling criterions, fun runs, and rowing regattas, airplane acrobatic competitions, etc, are susceptible to injunction on grounds of public nuisance.

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<sup>740</sup> The infringer is liable to a fine of £200.00 in England (section 37 Crime Justice Act 1982 (Eng)).

## Chapter 12

### Public sporting events create public nuisances by causing annoyance or discomfort to the public

A publicly exhibited sporting event may create a public nuisance because the event causes annoyance or discomfort to the public. The public right which is impinged upon here is, invariably, the public right to quietude or the public right to comfort.<sup>741</sup> In *Attorney-General of Ontario v Dieleman*, a case determining whether the focussed picketing activities of anti-abortionist protesters outside of doctors' private homes amounted to a public nuisance, the Ontario Supreme Court noted that nuisance embraces an expansive set of principles aimed at protecting a person's entitlement to reasonable use and enjoyment of one's home and neighbourhood.<sup>742</sup> The Canadian court referenced commentary of the United States Supreme Court on the unique nature of the home. The United States Supreme Court speaks of the home as "the last citadel of the tired, the weary, and the sick,"<sup>743</sup> and speaks of the need to protect "the well-being, tranquillity and privacy of the home..."<sup>744</sup> The public right to quietude or comfort may be impinged by the direct acts or omissions of the publicly exhibited sporting event (such as where, for example, a motorsport event creates noise) or the public right to quietude or comfort may be impinged by the staging of a publicly exhibited sporting event indirectly (such as where, for example, crowds of spectators disturb residents and communities adjacent the place where the publicly exhibited sporting event is staged).

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<sup>741</sup> A public right to comfort is acknowledged by the Supreme Court of Illinois: *City of Chicago v Beretta USA Corporation* 213 Ill 2d 351, 821 NE 2d 1099 (2004) at p 370 of the former report (Garman J).

<sup>742</sup> *Attorney-General of Ontario v Dieleman* [1994] CanLII 7509 at paras [693]-[698] (Ontario Supreme Court)

<sup>743</sup> *Gregory v Chicago* 394 US 111, 125 (1969) (Black J, concurring).

<sup>744</sup> *Carey v Brown* 447 US at 471. Here the US Supreme Court declared that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value". *Carey, supra*, at 471.

Publicly exhibited sporting events may cause annoyance and discomfort to the public. Such annoyance and discomfort may amount to a public nuisance at common law. Whether annoyance and discomfort to the public is created by a sporting event is a question of fact. Sports staged at certain times of the day, or on certain days of the week, may cause annoyance and discomfort to the public and thereby warrant abatement as a public nuisance, and yet when held at other times of the day, or on a weekend, may not be a public nuisance. Considerations which can greatly impact upon a determination as to whether a sporting event creates a public nuisance by impinging on the public right to quietude or comfort involve practical questions such as: How many events are staged per week? At which times of the day is a sporting event staged? What is tolerable to the residents and local community where a publicly exhibited sporting event is staged?

A publicly exhibited sporting event may create a public nuisance by a single, isolated event,<sup>745</sup> or by a continuing state of affairs,<sup>746</sup> or by an increase in the degree of sport exhibited or manner of exhibition.<sup>747</sup>

The standard applying to a determination as to whether a publicly exhibited sporting event creates annoyance and discomfort to the public is that expressed by Bruce-Knight VC in *Walter v Selfe*: “Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions

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<sup>745</sup> See *Aldridge v Van Patter* [1952] OR 595 at p 610 where it was said: “All wrongful escapes of deleterious things, whether continuous, intermittent, or isolated, are equally to be classed as nuisances in law; for they are all governed by the same principles.” In *Johnson v City of New York* 186 NY 139, 78 NE 715 (1906), the holding of a single motorcar race on a single occasion was opined to be a nuisance per se by the Court of Appeals of New York: at p 146. See also *Matheson v Northcote College Board of Governors* [1975] 2 NZLR 106. See also *Holling v Yorkshire Traction Company Ltd* [1948] 2 All ER 662 (Court of Appeal) and *Dollman v Hillman Ltd* [1941] 1 All ER 355 (Court of Appeal).

<sup>746</sup> See *Castle v St Augustine's Links Ltd* (1922) 38 TLR 615 where the evidence was to the effect that golf balls were very frequently sliced on to or over the public highway from the 13<sup>th</sup> tee. There was evidence of substantial interference with the use and enjoyment of the road. See also *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 at p 182, [1957] 1 All ER 894 at p 900.

<sup>747</sup> *Attorney-General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (BCSC); *Stretch v Romford Football Club Ltd* [1971] EGD 763.

among the English people?”<sup>748</sup> See also *Attorney-General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (BCSC) where Justice Brown states, at p 52, referring to *Goltan v De Held*, 21 LJ Ch 167, that the test as to what is a nuisance is an inconvenience materially interfering with the ordinary comfort physically of human existence according to plain, sober, and simple notions. However, the character of the locality in which a publicly exhibited sporting event takes place, or is proposed to take place, is important in determining the standard of comfort claimed. The court in *Laing v St Thomas Dragway* followed the dictum of Justice Morden in *Walker v Pioneer Construction Co Ltd*, where His Honour said: “The law makes it clear that the character of the locality in question is of importance in determining the standard of comfort which may reasonably be claimed by an occupier of land. ‘What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey’: *Sturges v Bridgman* (1879) 11 Ch 852, at p 865.”<sup>749</sup>

## 1. Publicly exhibited sporting events creating annoyance or discomfort directly

Annoyance and discomfort amounting to a public nuisance at common law is not only caused by crowds attending at sporting events, whether inside or outside the arena or premises where the sport is staged,<sup>750</sup> but may be created by the sport itself. In order to establish nuisance it must be shown that there has been substantial interference, annoyance, or discomfort to the public – a question of fact and degree dependent on the locality in which the sport is practised.<sup>751</sup> Although, mere noise alone will be sufficient to cause a public nuisance: for in *Gilbough v West Side Amusement Co* it was stated “That mere noise may be so great...as to amount to an actionable nuisance...is thoroughly established. The reason

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<sup>748</sup> (1851) 4 De G and Sm 315 at p 322, 64 ER 849 at p 852 (Knight-Bruce VC). Vice Chancellor Bruce-Knight’s dictum in *Walter v Selfe* was referred to with approval in *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR 482 at p 486 (Jordan CJ), and followed in *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, 136 ACWS (3d) 776 at para [41].

<sup>749</sup> (1967) 56 DLR (3d) 677 at p 680, followed in *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, [2005] 136 ACWS (3d) 776 at para [38].

<sup>750</sup> Contrast *Cronin v Bloemcke* 58 NJ Eq 313 (1899) with *Bellamy v Wells* (1890) 60 LJ Rep Ch NS 156.

<sup>751</sup> See eg *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, [2005] 136 ACWS (3d) 776 (Ontario Superior Court of Justice), and *Stretch v Romford Football Club Ltd* [1971] EGD 763, both discussed below, and both citing, with approval, *Walter v Selfe* (1851) 4 De G & Sm 315 at p 322 (Knight-Bruce VC).

why a certain amount of noise is or may be a nuisance is that it is not only disagreeable, but it also wears upon the nervous system and produces that feeling which we call ‘tired’....”<sup>752</sup>

Racetracks are among the sources of “noise and other disturbances of the peace in a neighborhood” that have been found to be public nuisances.<sup>753</sup> In *Hoover v Durkee*,<sup>754</sup> the Appellate Division of the Supreme Court of New York affirmed the trial court’s holding that the cumulative effect from the operation of a motorcar raceway created a public nuisance. The record supported the trial court’s conclusion that a public nuisance was established by clear evidence, and that the trial court correctly determined that the citizens had standing to institute an action based upon their showing of special damages. The Supreme Court affirmed the issuance of a permanent injunction. The facts which evidenced the public nuisance were: the testimony of numerous residents surrounding the racetrack that the noise generated by the racetrack drowned out all other sounds, prevented conversation outside the home or on the telephone, and was inescapable even when inside their homes with the windows closed. The noise was most commonly described as a constant roar like jets taking off or flying overhead. The evidence further revealed a noticeable increase in traffic on those days when the racetrack was operating and that the public announcement system could be heard not only in the immediate vicinity but also within a significant distance.<sup>755</sup> The racetrack was a public nuisance because it affected the comfort of the public.

The court in *Hoover v Durkee* followed *State of New York v Waterloo Stock Car Raceway Inc.*<sup>756</sup> In this earlier case, the defendants were permanently enjoined from operating a stock car racetrack or any related activity involving motorized vehicles on the premises of the Seneca County Fairgrounds in the village of Waterloo, New York. The Supreme Court found that the racetrack created a public nuisance based on the cumulative effect of (i) excessive noise, (ii) dust, and (iii) danger to public safety. The court concluded that the operation of the

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<sup>752</sup> *Gilbough v West Side Amusement Co* 64 NJ Eq 27, 53 A 289 (1902) at p 289 of the latter report.

<sup>753</sup> *Hoover v Durkee* 212 AD 2d 839 (1995) at p 840; see *State of New York v Waterloo Stock Car Raceway* 96 Misc 2d 350, 409 NYS 2d 40 (1978); *State of New York v Bridgehampton Road Races Corp* 54 AD 2d 929, 388 NYS 2d 131 (1976); *Bedminster Township v Vargo Dragway Inc* 434 Pa 100 (1969); *Jones v Queen City Speedways Inc* 276 NC 231, 172 SE 2d 42 (1970); *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, [2005] 136 ACWS (3d) 776 (Ontario Superior Court of Justice); *Stretch v Romford Football Club Ltd* [1971] EGD 763.

<sup>754</sup> 212 AD 2d 839, 622 NYS 2d 348 (1995).

<sup>755</sup> *ibid* at p 841.

<sup>756</sup> 96 Misc 2d 350, 409 NYS 2d 40 (1978).



raceway was an affront to, and invasion of, the surrounding residential community as a whole in the enjoyment of its common right to be free of conditions disrupting the tranquillity of the neighbourhood.

In a series of cases concerning the right to operate a racetrack in Missouri the Supreme Court of Missouri and, subsequently, the Court of Appeals of Missouri, found that the racetrack created a nuisance by noise – consisting of engine noise, the screeching of tires, the loudspeaker system, and the general hullabaloo of the racing fans – dust, offensive odours and fumes, and the glare from the floodlights at the track.<sup>757</sup>

When conducted in residential or quiet neighbourhoods, publicly exhibited sports are more readily subject to injunction, whether the noise levels generated by the sport increase or decrease over time. The rights of the neighbourhood are paramount to the rights of the sports promoter. In *Jones v Queen City Speedways Inc*,<sup>758</sup> the Supreme Court of North Carolina referred, with approval, to *Town of Bedminster v Vargo Dragway Inc*,<sup>759</sup> where the Pennsylvania Supreme Court permanently enjoined the operation of a drag strip which was located in an area primarily residential and farming in character with about 62 houses within one mile of the track. With reference to the equities involved, the court was of the opinion that: "...that the rights of those occupying properties adjoining or in the neighbourhood of this track are paramount to the rights of the [defendants], and that the former must be protected by equity in the enjoyment of their homes." In *West v Luna*,<sup>760</sup> the Court of Appeals of Tennessee held, in reference to the proposed operation of a racetrack in a rural area: "Losing the peaceful enjoyment of your home and yard for a six hour portion of every Saturday during the warm months of every year is a very substantial loss and would constitute a nuisance even if it were quiet as a tomb next to the racetrack at 2:00 a.m. every Sunday of the year." Motorcar races were proposed to take place only 15 times per year, only on a Saturday, and only between the months of May through August, yet the Court of Appeals was satisfied that

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<sup>757</sup> *Lee v Rolla Speedway Inc* 494 SW 2d 349, Supreme Court of Missouri (1973); and subsequently, *Lee v Rolla Speedway Inc* 539 SW 2d 627 (1976), and *Lee v Rolla Speedway Inc* 668 SW 2d 200, Court of Appeals of Missouri (1984).

<sup>758</sup> 276 NC 231, 172 SE 2d 42, Supreme Court of North Carolina (1970).

<sup>759</sup> 434 Pa 100, 253 A 2d 659 (1969).

<sup>760</sup> 2003 Tenn App LEXIS 968 (Tenn Ct App, 6 January 2003), appeal denied *West v Luna* 2004 Tenn LEXIS 750 (Tenn, 7 September 2004).

such created a nuisance in the circumstances of the case. “Whether a particular noise is sufficiently excessive to constitute a nuisance is ordinarily a question of degree and locality – in essence a question of fact to be considered in light of all the attending circumstance.”<sup>761</sup>

In 2005, in *Laing v St Thomas Dragway*,<sup>762</sup> the Ontario Superior Court of Justice issued an injunction against the operators of a dragway preventing them from racing drag cars on a Sunday before 1 p.m., even though the races had been conducted at the dragway for over 40 years previously, and even though noise levels associated with the drag racing had decreased since 1999.<sup>763</sup> Despite the decrease in noise levels which was brought about by restrictions implemented by the owners of the dragway, the court was satisfied that the plaintiffs had a paramount right to enjoy their Sunday mornings free of interruption or annoyance. The various plaintiffs were a group of thirty-three residents of the Hamlet of Sparta – which may have satisfied the ‘public’ element of public nuisance.<sup>764</sup> They complained of the audibility, the nature and the consistency of the noise emanating from the dragway, where dragster cars raced against each other. Further, they complained of the vibrations felt when the jet cars were operating, the audibility of the public announcement system, the traffic congestion when the special events occurred, and the odour and smoke from the burning tires. On Sunday mornings, the noise interfered with church services and Quaker meditation sessions, or just quiet Sunday mornings. Noise analysis indicated that the noise level emanating from the dragway, at sounds levels above 80dba, exceeded the Ministry of Environment guideline limits. The judge was satisfied that the plaintiffs had discharged their onus in proving a nuisance with respect to Sunday mornings when they wished to lie quiet in bed or worship at their various churches or meet at their Quaker meeting hall.

In deciding whether the use of the dragway amounted to a private nuisance, the court in *Laing v St Thomas Dragway* followed the dictum of Justice Morden in *Walker v Pioneer*

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<sup>761</sup> *ibid.*

<sup>762</sup> [2005] OJ No 254, 2005 ACWSJ 1385, 136 ACWS (3d) 776.

<sup>763</sup> *ibid* at para [53] and paras [62]-[63].

<sup>764</sup> In *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169, [1957] 1 All ER 894, the Court of Appeal for England and Wales held that the residents of 30 households were sufficient to prove the public element of the offence of public nuisance, as distinct from a private nuisance actionable by private plaintiffs. Sixteen households were sufficient to prove the ‘public’ element of public nuisance in *Bathurst City Council v Saban (No 2)* (1986) 58 LGRA 201 (Supreme Court of New South Wales, Equity Division, 13 March 1986) BC8601183 at 5. Seven families were all that was required to prove public nuisance in *Attorney General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (British Columbia Supreme Court).

*Construction Co Ltd*, where His Honour said: “The law makes it clear that the character of the locality in question is of importance in determining the standard of comfort which may reasonably be claimed by an occupier of land. ‘What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey’: *Sturges v Bridgman* (1879) 11 Ch 852, at p 865.”<sup>765</sup> The court also noted Justice Morden’s dictum that: “An alleged nuisance of the type with which we are concerned, to be actionable: ‘...must be such as to be real interference with the comfort or convenience of living according to the standards of the average man... Moreover, the discomfort must be substantial not merely with reference to the plaintiff; it must be of such a degree that it would be substantial to any person occupying the plaintiff’s premises, irrespective of his position in life, age, or state of health; it must be ‘an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to the elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English [Canadian] people’ (*Walter v Selfe* (1851) 4 De G & Sm 315, 322).”<sup>766</sup>

Although much of the case law concerning sports and nuisance involves private litigants suing in private nuisance or suing for *public nuisance creating special and peculiar damage to an individual*, there is no reason to doubt the applicability of the case law to public nuisance suits at the instigation of the Attorney-General. A public nuisance is nothing more than a sufficiently large number of private nuisances such that the ‘public’ element of the offence of public nuisance is proved. Indeed, as noted by Lord Justice Romer in *Attorney-General v PYA Quarries*: “Some public nuisances (for example, the pollution of rivers) can often be established without the necessity of calling a number of individual complainants as witnesses. In general, however, a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, *a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances.*”<sup>767</sup> The use of the common law of public nuisance to combat noise or crowds associated with sporting events is not confined to case law involving private plaintiffs suing for injunctive

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<sup>765</sup> (1967) 56 DLR (3d) 677 at p 680, followed in *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, [2005] 136 ACWS (3d) 776 at para [38].

<sup>766</sup> *ibid* at p 690, followed in *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, [2005] 136 ACWS (3d) 776 at para [41].

<sup>767</sup> [1957] 2 QB 169 (CA) at p 187 (italics mine). See also *People v Rubenfeld* 254 NY 245 (1930) at p 247 (Chief Justice Cardozo), followed in *Hoover v Durkee* 212 AD 2d 839 (1995) at p 840.

relief or damages. Case law in New York and British Columbia has highlighted the extent to which the state, through their Attorney-General, ought to be involved in the control of nuisance arising from sport, particularly with reference to nuisances caused by noise. In *State of New York v Bridgehampton Road Races Corp*,<sup>768</sup> the Attorney-General of New York “instituted an action as *parens patriae*” of those individuals who had been or would be injured by the alleged public nuisance created by the defendant sports corporations. The action commenced by the State was for a mandatory injunction restraining the maintenance of a public nuisance, consisting of the emission of loud and disagreeable noises from unmuffled vehicles operating at an automotive racetrack at Long Island. In the recent decision of the Appellate Division of the Supreme Court of New York, in *Wheeler v Lebanon Valley Auto Racing Corp*,<sup>769</sup> the court found that owing to the absence of proof of special injury to the private plaintiffs, the trial court erred in allowing the private litigants to prosecute the action as one to enjoin a public nuisance. The defendants operated an oval automobile racing track and a drag strip located in a rural area. The Speedway had been in operation for 40 years, but the plaintiff’s contended that the Speedway’s racing events and activities in preparation for racing had become much noisier and more frequent since 1994 when \$2,000,000 worth of improvements to the track were made.<sup>770</sup> The defendants sought to increase the use of, and increase the profit to be gained from, the speedway. The Supreme Court found that all persons in the affected community were ‘similarly impacted’ by exposure to ‘unacceptable’ noise levels during the Speedway’s activities. Most plaintiffs testified only that the Speedway’s noise interfered with their ability to converse, listen to music or television, conduct social activities, and/or sleep at their residences. The facts therefore gave rise to a public nuisance offence, actionable at the behest of the Executive Government on relator action of the plaintiffs. Because the plaintiffs could not prove special injury to themselves different from the community generally, they did not have standing to prosecute the public nuisance and their action for abatement of the nuisance failed. Of course, what the lawyers for the plaintiff’s ought to have done was to seek the consent of the Attorney-General of New York to commence a relator action for abatement of a public nuisance based on the increased levels of noise generated by the increased activity at, and use of, the speedway.

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<sup>768</sup> 44 AD 2d 725 (1974).

<sup>769</sup> 303 AD 2d 791, 755 NYS 2d 763 (2003), appeal denied 100 NY 2d 507, 795 NE 2d 39 763 NYS 2d 813 (2003).

<sup>770</sup> 303 AD 2d 791 (2003) at pp 791 and 794.

In *Attorney-General of British Columbia v Haney Speedways Ltd*,<sup>771</sup> seven neighbouring families commenced action against the racetrack in the name of the Attorney-General on relator action for a declaration that a motor speedway constituted a public nuisance, and for an injunction. The case provides a classic example of a relator action brought by aggrieved plaintiffs in the name of the Attorney-General for abatement of a sport causing a public nuisance. A motor racing speedway was operated by defendant in a rural and somewhat sylvan area on sixteen Sundays a year, in the summer time, under an agreement with the municipality in which the land lay but it was not a statutorily-authorized activity. The evidence showed that cars without mufflers raced on the quarter-mile oval track with consequent noise before average Sunday crowds of 1,400 to 1,600 persons. The plaintiffs gave evidence that their Sundays were made hideous by the operation of the speedway. The British Columbia Supreme Court held that the seven residents comprised a sufficient number of persons to constitute a class of the public, and that the Attorney-General was entitled to an injunction against operation of the speedway as being a public nuisance. The court was satisfied that there was a material interference with ordinary physical comfort according to plain and sober and simple notions obtaining among the people of the Province.

As evidenced by *State of New York v Waterloo Stock Car Raceway Inc*, discussed above, and *State of New York v Bridgehampton Road Races Corp*, and *Attorney-General of British Columbia v Haney Speedways Ltd*, the Attorney-Generals of New York and British Columbia appear more conscious of the Executive Government's responsibility under constitutional law, as *parens patriae*, to protect public rights through the application of common law public nuisance suits, than other common law jurisdictions. These cases demonstrate the degree to which the Crown ought to be involved with sports associations, or sponsors, promoters, or owners of sports teams, as well the owners or occupiers of sports stadia or sportsgrounds, in controlling the excesses of corporatized sports franchises and businesses in the interest of the public wellbeing.

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<sup>771</sup> [1963] 39 D.L.R. (2d) 48 (BCSC).

Public exhibitions of sport must, as a matter of law, and in order to comply with the common law rules of public nuisance, be conducted in such a way as to obviate unreasonable annoyance or discomfort to the peaceable rights of residents of the local community wherein such sport is practised. If this means that public exhibitions of sport must modify the way in which they are played, such as by altering the shape, length or direction of a fairway or a hole on a golf course, or by refraining from conducting motorcar racing at night, or by staging football contests at times which do not interfere with the peaceable progress of life, then that is the charge which sports organizations must bear in order that they be lawfully conducted in civil society. The commercial motivations of corporatized sporting associations must yield to the rights of the public generally to live peaceably and comfortably without undue interference. This is the principle of law established by the nuisance cases involving sports enterprises.<sup>772</sup> It is a principle which, for several centuries, underpinned Executive edicts and statutory provisions outlawing designated sports such as football.<sup>773</sup> A sport which creates a nuisance must either cease its practise or amend its practise to end a threatened or an existing nuisance. Given the magnitude of interest in sport, its cultural significance, and given the Executive Government's constitutional function, in reference to the common law offence of public nuisance, the Executive Government is the responsible entity to monitor the use of stadia, parks, roads, highways, and public areas, where sports are practised, and to prevent or

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<sup>772</sup> Note as discussed above *Bellamy v Wells* (1890) 60 LJ Rep Ch NS 156; *Cronin v Bloemecke* 58 NJ Eq 313 (1899); *Devar v City and Suburban Race Course Co* [1899] 1 IR 345; *Stretch v Romford Football Club Ltd* [1971] EGD 763; *New York v Waterloo Stock Car Raceway* 96 Misc 2d 350, 409 NYS 2d 40 (1978); *Sherrod v Dutton* 635 SW 2d 117 (1982); *Hoover v Durkee* 212 AD 2d 839, (1995) at p 840; and *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, [2005] 136 ACWS (3d) 776 (Ontario Superior Court of Justice).

<sup>773</sup> See eg the Proclamation on Tournaments of Richard I dated 20<sup>th</sup> August 1194: Foedera vol i, at p 65; W Stubbs (RS) (ed) *Chronica magistri by Hovenden* (Longman London 1868-1871) vol iii, at p 268; and R Howlett (ed) *Chronicles of the reigns of Stephen, Henry II, and Richard I edited from the manuscripts* (Longman London 1884-1889) vol ii, cap IV, at p 422; Short extracts from Public Records Additional MS 4712 (British Library) at f. 91b; and Harl MS 69 (British Library). And see Executive edicts in subsequent centuries such as: (1) the Statuta Armorum of 1292 (Danby Pickering (ed) *The Statutes at Large* (Joseph Bentham London 1762) vol 1). See also A Luders (ed) *The Statutes of the Realm: Printed by Command of His Majesty King George the Third, in Pursuance of an Address of the House of Commons of Great Britain, From Original Records and Authentic Manuscripts, 11 vols* (Record Commission London 1810-1828) vol I, at pp 230-231. (2) The Proclamatio facta pro Conservatione Pacis, 1314 (*Proclamatio facta pro Conservatione Pacis*, (Extract from the Liber Memorandum) in HT Riley (ed) *Munimenta Gildhallae Londoniensis; Liber Albus, Liber Custumarum, et Liber Horn* (Longman London 1862) vol III, at pp 439-441); and (3) The Proclamation of 39 Edw. 3, memb. 23d 39 Edw 3 membrane 23d; *Calendar of Close Rolls, Edward III, 1364-1368* (HMSO London 1910) vol XII, at p 181. For statutes which evidence the underlying principle that sports must be practised so as not to endanger public wellbeing, see eg 33 Hen 8 c 9 (1541); 16 Chas 2 c 7 (1664); and 9 Anne c 14 (1710). See further the discussion in Chapter 15, below.

remedy the existence of any public nuisance. Failure to so do is an abrogation of their constitutional function as *parens patriae* to protect public rights.

Further to case law on baseball, boxing, horseracing and motorcar racing, discussed above, there have been a number of cases where the playing of golf with many golf balls trespassing onto adjoining property or onto the public highway has been held a nuisance. Whilst projectile golf balls may create a public nuisance by causing obstruction to the highway (*Castle v St Augustine's Links*)<sup>774</sup> or by impinging on the public right to health and safety (*Gleason v Hillcrest Golf Course Inc*)<sup>775</sup> (*Townsley v State of New York*)<sup>776</sup> golf tournaments may create a public nuisance by causing annoyance or discomfort to the public. In cases where games of golf annoy and disturb the public thereby creating public nuisances, the courts have intricately framed injunctions by requiring defendant golf course owners or golfing clubs to reposition golf tees, fairways and greens to obviate the creation of public nuisances. The Supreme Court of New Jersey, in *Sans v Ramsey Golf & Country Club Inc*,<sup>777</sup> in an action in private nuisance, held that an injunction enjoining the use of the two tees was proper where play on the tees continued from 6 a.m. until twilight, crowds collected while waiting to tee off, the golfers demanded absolute silence and immobility of everything in sight when teeing off, and the adjoining landowner and his family and pet were constantly annoyed, endangered, and restricted in the use of their property by the golfers' activities. The court pointed out that relocation of the tees the cause of the nuisance in the case was feasible. A similar case was argued in the unreported New South Wales Court of Appeal decision of *Campbelltown Golf Club Limited v Winton*. In this case, a submission was put that the plaintiffs had built their houses with full knowledge of the existence of the golf course and further, that their houses were built on land included in a subdivision in which the golf course was designed as the focal point. In reference to the appellant's arguments, Sheppard AJA said at page 3:

"The problem with the appellant's submission is that it endeavours to relegate houses built on land in the subdivision to an inferior position to that occupied by the golf course. In the appellant's submission, the golf

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<sup>774</sup> (1922) 38 TLR 615.

<sup>775</sup> 148 Misc 246, 265 NYS 886 (1933).

<sup>776</sup> 6 Misc 2d 557, 164 NYS 2d 840 (1957).

<sup>777</sup> 29 NJ 438, 149 A 2d 599 (1959)

course was the focal point. If it created a problem for residents, that was something which the residents had to tolerate. That is not the law. **What was required was that the golf course should so adjust its activities as not to interfere unreasonably with the peaceable enjoyment by residents of their land.** At the same time, the residents, bordering as they did a golf course, had to accept the fact that the game of golf was going to be played on land adjoining their properties and that it could be expected that from time to time some golf balls might come on to their land. But what they were not bound to accept was the situation such as was suffered by the respondents in which their property was peppered with golf balls on a daily basis thus posing a threat, not only to the respondents' property but also to their physical safety. The golf course was obliged so as to construct the hole as to divert balls hit normally away from their property. This could be done by re-sitting the direction of the hole or by appropriate screens, whether natural or artificial, or a combination of both as indeed has apparently happened.”<sup>778</sup>

## 2. Publicly exhibited sporting events creating annoyance or discomfort indirectly

Public sporting events at which cheering, jeering, and swearing is often heard, and to which large crowds are amassed together, may be a public nuisance at common law. The potential legal difficulties which might arise when staging a modern publicly exhibited sporting event such as cricket were contemplated as early as 1743. In the September 1743 edition of *Gentleman's Magazine* it was noted: “Noblemen, gentlemen and clergymen have certainly a right to divert themselves in what manner they think fit, nor do I dispute their privilege of making butchers, cobblers or tinkers their companions, provided they are gratified to keep them company. But I very much doubt whether they have any right to invite thousands of

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<sup>778</sup> *Campbelltown Golf Club Limited v Winton* [1998] NSWSC 257 (New South Wales Court of Appeal, 23 June 1998) at p 3.



people to be spectators of their agility.”<sup>779</sup> In *Bellamy v Wells*,<sup>780</sup> Justice Romer enjoined the staging of boxing matches at a club in London, which had the effect of collecting large and noisy crowds in the streets outside of the premises. The nuisance created in the circumstances of the case was nuisance by noise of the crowds at night. Whilst this case concerned the law of private nuisance, there is no cause to rebuff its applicability to public nuisance. A defendant may be guilty of a public nuisance if the nuisance is committed in such a place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and discomfort, and a wrong against the community, which may be properly the subject of a public prosecution. The area of tumult, and the range of its disturbing power, may be wide enough to bring the behaviour in question within the category of a public nuisance.<sup>781</sup>

In *Bellamy v Wells*, the club was formed to hold boxing contests, for large money prizes, between celebrated professional boxers. The boxing matches took place at night, generally from about midnight until early in the morning, in the basement of the club premises several times in the year. The boxing matches attracted large crowds of spectators. These crowds congregated outside the club on all nights that the boxing matches were held. The spectators to the boxing events created a nuisance by the noise they generated, by “cheering, hooting and whistling”, especially when the boxers arrived at the club for the fight, and by whistling for carriages and cabs to the club between the hours of midnight and 7 a.m.<sup>782</sup> Justice Romer considered the nuisance of a “serious nature”, preventing sleep, and interfering with the comfort of the plaintiffs.<sup>783</sup> The proprietor of the club, his managers, and agents, were restrained from carrying on boxing contests at the club so as to cause a crowd to be assembled, or to cause whistling for cabs or carriages.<sup>784</sup> Justice Romer followed

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<sup>779</sup> Quoted in Sir Derek Birley *Sport and the Making of Britain* (Manchester University Press Manchester 1993) at p 120.

<sup>780</sup> (1890) 60 LJ Rep Ch NS 156.

<sup>781</sup> Note eg *Attorney-General v PYA Quarries* [1957] 2 QB 169 where Lord Justice Romer stated at p 187: “Some public nuisances (for example, the pollution of rivers) can often be established without the necessity of calling a number of individual complainants as witnesses. In general, however, a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances.” (italics mine). See also *People v Rubenfeld* 254 NY 245 (1930) at p 247 (Chief Justice Cardozo), followed in *Hoover v Durkee* 212 AD 2d 839 (1995) at p 840.

<sup>782</sup> *ibid* at pp 161 and 162.

<sup>783</sup> *ibid*.

<sup>784</sup> *ibid* at p 164.

*R v Moore*<sup>785</sup> in holding that the assembled crowd was the probable consequence of the defendant's act in staging the boxing matches.<sup>786</sup>

The public right impinged upon by the staging of boxing matches in the *Bellamy v Wells* case was the public right to quietude. The nuisance was created not by the direct actions of the promoters of the boxing matches, or of the owners of the premises where the boxing matches were staged, but, rather, indirectly by the noise of the crowds attending as spectators to the boxing matches. The crowds created a public nuisance not by causing obstruction or inconvenience to the public by impinging on the public right of way on the highway, but by causing annoyance and discomfort to the public impinging public comfort and the public right to quietude.

Sporting activities may be public nuisances on the basis that they are apt to draw together large numbers of disorderly persons to the annoyance and discomfort of the neighbourhood where the sport is staged. This principle for a long time justified the prosecution of gaming houses as public nuisances. Hawkins lays it down that: "There is no doubt but that common bawdy-houses are indictable as common nuisances,... and also common gaming houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood."<sup>787</sup> In *R v Higginson*,<sup>788</sup> a decision from 1762, the Court of King's Bench upheld an indictment for a public nuisance which was alleged to have been created by a premises at which was staged boxing matches, cockfighting, and playing at cudgels. The premises attracted crowds which were a nuisance to the public. The indictment was for keeping and maintaining "a certain common, ill-governed, and disorderly house, and in the said house, for his own lucre and profit, certain evil and ill-disposed persons, of ill name and fame, and of dishonest conversation, to frequent and come together, then and there unlawfully did cause and procure; and the said persons, in the said house, then" &c., "and there to be and remain, fighting of cocks, boxing, playing at cudgels, and misbehaving themselves, unlawfully and wilfully did permit, and yet

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<sup>785</sup> (1832) 3 B & Ald 184.

<sup>786</sup> (1890) 60 LJ Rep Ch NS 156 at p 161.

<sup>787</sup> 1 Hawk PC ch 75, s 6.

<sup>788</sup> (1762) 2 Burr 1232, 97 ER 806.

doth permit; to the great damage and common nuisance of all the subjects of our said lord the king, inhabiting near the said house, and against the peace,” &c. Upon motion in arrest of judgment the indictment was adjudged good by the Court of King’s Bench.

Hawkins *Pleas of the Crown* was applied directly in *Walker v Brewster*,<sup>789</sup> along with the decision of *R v Moore*.<sup>790</sup> In *Walker v Brewster* Sir W Page Wood VC held that the collection of a crowd of noisy people, to the annoyance of the neighbourhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver of the entertainment is liable to injunction, even though the amusements within the grounds have been conducted in an orderly way to the satisfaction of police. The defendant held fetes every Monday and Friday over the summer months in 1867. The fetes brought together great crowds of persons. Music was played. Great numbers of boys climbed on to the walls of the plaintiff’s grounds adjoining the property where the entertainments were staged. The shouting of the people assembled was loud and continuous. Page Wood VC stated the circumstances of the case thus:

“What, then, is the nuisance complained of? Three things are alleged: First: The noise of a very powerful band of eighteen performers, which performs regularly twice a week, from two or three in the afternoon, until eleven at night. The second evil complained of is a serious one, the throwing up of rockets, to say nothing of the noise and glare of the fireworks, in the immediate neighbourhood of the Plaintiff’s premises, and the risk to his garden and greenhouses from the falling of the rocket sticks. The third nuisance complained of is exactly the case of *R v Moore* 3 B & Ald 184, which stands upon grounds that are unimpeachable. The plaintiff complains that when these fetes are given crowds of idle people are drawn together who, being idle, do not pass on, but occupy the road and the plaintiff’s wall so as to obtain a view of the fireworks and other entertainments... [T]he complaint of the plaintiff is not against the

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<sup>789</sup> (1867) LR 5 Eq 25 at pp 33-34.

<sup>790</sup> (1832) 3 B & Ald 184.

persons who are actually in the grounds, but against those who have been shut out and had admission refused to them.”<sup>791</sup>

The Vice-Chancellor concluded “that a clear case of nuisance is established in the collecting of the crowd alone; and... I am not bound to specify the other nuisances to which this gentleman has been subjected. Having regard to the fact of this court having restrained the ringing of bells (*Soltan v De Held* 2 Sim (NS) 133), I confess I have a strong opinion that the setting up of a powerful brass band, which plays twice a week for several hours in the immediate vicinity of a gentleman’s house, is a nuisance which this court would restrain. I have a still clearer opinion that the noise of fireworks, as contrasted with the noise of the tolling of a bell, to say nothing of the damage that may be occasioned by falling rocket sticks, is a serious nuisance.”<sup>792</sup> On the facts in *Walker v Brewster* the defendant’s entertainments created a nuisance both *directly* – with the music and fireworks – and *indirectly* – by drawing crowds of people to the roads and properties adjacent the defendant’s property.

Many publicly exhibited sporting events augment their sport with loud music, half time musical entertainments, and fireworks. Each of these may amount to a nuisance following *Walker v Brewster*, by causing annoyance or discomfort to the public directly. But *Walker v Brewster* was decided principally on the basis of the annoyance and discomfort caused by the crowds of spectators drawn to the roads and properties adjoining the defendant’s estate. The defendant’s entertainments thus created a nuisance by causing annoyance and discomfort indirectly. Indeed, on the facts of the case, the defendant had gone to great lengths to ensure that the crowd attending the entertainments was orderly and peaceable stationing policemen at the entrance to his estate,<sup>793</sup> yet was nonetheless found liable for the nuisance created by those crowds seemingly beyond his control. This decision has an important relevance to modern publicly exhibited sporting events which draw crowds of hopeful spectators to camp outside the premises of the sporting event waiting in line for entry or tickets. One example of this is the great throngs of people who wait in a very long queue, often extending several hundred metres, on the footpaths of Church Road

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<sup>791</sup> (1867) LR 5 Eq 25 at p 31.

<sup>792</sup> *ibid* at p 34.

<sup>793</sup> *ibid* at p 31.

Wimbledon outside the Wimbledon tennis complex.<sup>794</sup> The members of this queue are people who do not usually possess tickets to the tennis event, but who desire entry by the purchase of a limited number of daily tickets available for sale which are not presold, or by the purchase of returned tickets from spectators who are encouraged to hand their tickets back to the tournament organizers when leaving the tournament early in the day in order that these tickets might be resold to the profit of the tournament organizers. The appropriation of the footpath by hopeful attendees to the tennis tournament, desirous of a ticket, with such persons camped on the footpath or in the public park adjoining the tennis complex, and often sleeping overnight, eating, and staking out their place in the queue on the public footpath, over a considerable number of hours and days, may amount to a public nuisance being either an obstruction to the public right of way, or being an annoyance or discomfort to residents living in close proximity to the tennis complex.<sup>795</sup>

Crowds attracted to regattas, sponsored by a railway company who acquired ownership of a reservoir in a beautiful part of Staffordshire and desired to make profit from it, caused a public nuisance in *Bostock v North Staffordshire Railway Co.*<sup>796</sup> Mrs Bostock complained that the result of the regatta was to collect disorderly crowds of people, who broke down her fences and trod down her grass, to her great injury, and she said it was not the right of the railway company, and it was not within the business of a railway company, to collect crowds of people and to permit this kind of disorder. Sir James Parker, V-C, before whom the case

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<sup>794</sup> In 2002, 9,000 people desirous of a ticket camped out in Wimbledon Park: H Arkell and S Bhatia 'Wimbledon Limits Seats for People's Saturday' *Evening Standard* (London United Kingdom 19 June 2003) <<http://www.thisislondon.com/sport/wimbledon/articles/5401063%3Fsource%3DEvening%2520Standard>> (18 May 2005). In 2009, over 2,000 people were reported to be camping overnight: M Townsend and E Ferguson 'Heatwave Forecast Triggers the First UK Alert Over Health Fears' *The Guardian* (London United Kingdom 27 June 2009) <<http://www.guardian.co.uk/uk/2009/jun/27/heatwave-forecast-met-office>> (28 June 2009).

<sup>795</sup> See also *Lyons, Sons & Co v Gulliver* [1914] 1 Ch 631 where the plaintiffs were entitled to relief against the defendants, who were proprietors of the Palladium Theatre, in respect of a nuisance caused by a queue formed twice daily by people going to the defendant's theatre. The queue extended for a considerable distance in front of the plaintiffs' place of business and was extant for considerable periods of time. In consequence of the queue access to the plaintiffs' adjacent shop was obstructed and the plaintiff lost business. The Court of Appeal held, per Cozens-Hardy MR and Swinfen Eady LJ, Phillimore LJ dissenting, that the obstruction of access to the plaintiffs' shop caused by the crowd of theatregoers was an actionable nuisance, the obstruction of the highway (in this case the footpath) being a public nuisance.

<sup>796</sup> (1852) 5 De G & Sm 584, 64 ER 1253.

came in the first instance, held the regatta was a nuisance and enjoined the defendant from holding more regattas.<sup>797</sup>

*R v Moore*<sup>798</sup> and *Bellamy v Wells*<sup>799</sup> were followed in *Cronin v Bloemecke*,<sup>800</sup> where the Court of Chancery of New Jersey granted a preliminary injunction against the playing of baseball games at a baseball field near Newark. The Vice-Chancellor was satisfied that the crowds of disorderly persons upon the highways, drawn there by entertainments given by a the defendant upon his own land, for pecuniary profit, was a public nuisance.<sup>801</sup> The court also noted the loud, indecent and profane noises occurring while games were in progress. In issuing an injunction, the court's approach was directed toward managing and limiting the nuisances created by the staging of a public sport, without the need to stop the playing of the games altogether. Emery VC noted: "I think the complainant has made out a *prima facie* case of serious annoyance which entitles him to protection pending the final hearing,... But this protection, if given, should not extend to an absolute restraint against playing the games of baseball upon the park. A decree to this extent might not be proper, even upon final hearing, unless it appeared after full hearing that the games could not be carried on under defendants' management without creating a nuisance."<sup>802</sup> The injunction was framed in the following fashion: "An interlocutory injunction should not go further than to restrain the defendants, pending the hearing, from using or permitting to be used the premises called the Shooting Park mentioned in the bill, or any part thereof for the purpose of base ball games, so that a nuisance may be occasioned to the annoyance and injury of the complainant and his family at his residence or premises mentioned in the bill, either by the driving or dropping of balls upon his premises, or by trespassing from the players or spectators of the games, or by profane or indecent language upon the grounds, or from idle or disorderly persons in the streets collected by the games."<sup>803</sup> The injunction did not prevent the playing of baseball altogether.

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<sup>797</sup> There is also a summary of the facts of this case by Malins VC in *Norton v London & North Western R Co* (1878) 47 LJ Ch 859 at p 862.

<sup>798</sup> (1832) 3 B & Ald 184.

<sup>799</sup> (1890) 60 LJ Rep Ch NS 156.

<sup>800</sup> 58 NJ Eq 313 (1899) at p 318 (Vice-Chancellor Emery).

<sup>801</sup> *ibid*, at headnote and p 318.

<sup>802</sup> *ibid* at p 316.

<sup>803</sup> *ibid*.

*Cronin v Bloemecke* provides a model example of how the equitable jurisdiction of the courts may be directed toward limiting conduct concomitant with public sports events which is a nuisance. Injunctions can be framed to limit the inconvenient, obstructive, disturbing or discomforting conduct associated with the sport at issue, without stopping the playing of the sport in public altogether. In utilising their right to institute ex officio civil proceedings for abatement of a public nuisance, the Executive of Government obtains an efficacious means of limiting the abuses and excesses concomitant with the playing of financially motivated public sports, without preventing the staging of those public events themselves. The Executive of Government is thus doing no more than is required of them as *parens patriae* under constitutional law to protect public rights without unfairly treating sporting organizations desiring to stage sporting events.

*Cronin v Bloemecke* was followed in *Gilmour v Green Village Fire Department Inc.*<sup>804</sup> where the Superior Court of New Jersey held that an individual plaintiff was able to enjoin a public nuisance where it was shown that he has suffered some private, direct and material damage beyond the public at large. The defendant corporation supplemented its primary purpose and became an active promoter in the field of athletic competition. Several baseball teams, designated by class, were organized and practically all of the remaining land of the defendant was laid out as a baseball diamond and equipped with portable seating equipment for spectators. The defendant sponsored night baseball games, with the benefit of arc lights, on the average of three games per week. The usual starting time for such games was 9 p.m., concluding between 11 p.m. and midnight. Large crowds of two hundred or three hundred spectators assembled to witness the games. The spectators shouted at the games and a loud public address system was used to explain to those assembled various aspects of the games. Some of the more enthusiastic people, who observed the games from their automobiles, displayed their enthusiasm by blowing their automobile horns during the course of the games.<sup>805</sup> The plaintiff did not object to the playing of baseball at night, merely to the playing of baseball at a late hour. The case is similar on its facts to *Bellamy v Wells*.<sup>806</sup> The plaintiff attempted to adjust matters amicably by appealing to the defendant, to the local

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<sup>804</sup> 2 NJ Super 393, 63 A 2d 918 (1949).

<sup>805</sup> 2 NJ Super 393 (1949), at pp 394-395.

<sup>806</sup> (1890) 60 LJ Rep Ch NS 156.

Board of Health, to the State Board of Health and to the local Township Committee, with no success. Alike *Cronin v Bloemecke*,<sup>807</sup> the court adopted a managerial approach to the nuisance, framing the injunction to limit the occurrences of the nuisances, without stopping the playing of the baseball games altogether. The injunction provided that only three games per week were permitted, and that the games had to be completed and the lights turned off by 9 p.m., except if a game was played on a Friday, when the lights had to be turned off by 10 p.m.<sup>808</sup>

The playing of baseball is not a nuisance per se against which persons living in the vicinity are entitled to equitable relief.<sup>809</sup> Of course, nuisance suits against the playing of baseball games to which crowds of spectators attend have failed. In *McMillan v Kuehnle*,<sup>810</sup> the plaintiff complained of “cheering and screaming and yelling and hooting, and stamping of feet on the boards, by those within the park attending said games.”<sup>811</sup> Yet the Court of Errors and Appeals of New Jersey held that: “We think the bill and affidavits of the complainants do not make out a case which entitles them to a preliminary injunction.”<sup>812</sup> In *Casteel v Town of Afton*,<sup>813</sup> the Supreme Court of Iowa affirmed the trial court’s refusal to grant an injunction against the playing of baseball on the basis that the plaintiffs failed to prove that the baseball games created an annoyance or discomfort sufficient to amount to a nuisance.

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<sup>807</sup> 58 NJ Eq 313 (1899).

<sup>808</sup> The injunction read: “Three games may be played with the benefit of arc lights per week. The games played on evenings other than Fridays must terminate at 10 p.m., that is, the arc lights must be extinguished at that hour on those nights. One game may be played with the benefit of the arc lights on Friday evenings which game must terminate at 11 p.m., that is, the lights must be extinguished at that hour. The loud-speaker may not be used at any time during the day or night. (The defendant has agreed to this last restraint). The blowing of automobile horns shall be controlled as much as possible by the defendant. To accomplish this, the defendant shall, before the commencement of each game, designate one or more of its officers or members for the purpose of informing those who observe the games from the automobiles to desist from sounding their horns as a means of displaying their enthusiasm. Unless the sounding of automobile horns at the games is controlled by the defendant, the plaintiff shall have the right to apply again to this court for an injunction as to the playing of all future games after 9 p.m.” (2 NJ Super 393 (1949), at p 396).

<sup>809</sup> *Spiker v Eikenberry* 135 Iowa 79, 110 NW 457 (1907) followed in *Casteel v Town of Afton* 227 Iowa 61, 287 NW 245 (1939) at pp 65-66. See also *Gleason v Hillcrest Golf Course Inc* 148 Misc 246, 265 NYS 886 (1933) at p 249 of the former report, citing *Young v New York, New Haven & Hartford Railway Company* 136 AD 730, 121 NYS 517 (1910) at p 731 of the former report.

<sup>810</sup> 78 NJ Eq 251 (1910).

<sup>811</sup> *ibid* at p 252.

<sup>812</sup> *ibid* at p 253 (Chief Justice Gummere).

<sup>813</sup> 227 Iowa 61, 287 NW 245 (1939).



But injunctions restraining and preventing publicly exhibited sporting events being played in such manner as to create nuisances are appropriate.<sup>814</sup> The rule established by *R v Moore*, that an individual is responsible in nuisance for collecting together a crowd of people where that crowd creates some obstruction, inconvenience or disturbance amounting to a nuisance, being followed in *Bellamy v Wells*, and *Cronin v Bloemecke*, was followed in *Seastream v New Jersey Exhibition*.<sup>815</sup> In this latter case, the defendants contended that baseball had been played at the field now occupied by them for many years and that this fact ought to estop the plaintiffs from their claim in nuisance. The Vice-Chancellor rejected this contention, being firmly of the view that the commercialisation of the sport of baseball at the field in question, which was previously open in common, and the playing of corporatized sport on a Sunday was a cause of nuisance. Vice Chancellor Pitney stated:

“The state of affairs, however, was entirely changed when the defendant, a corporation, obtained exclusive possession and fenced in the old ball ground, erected accommodations in the way of seats and a grand stand, and fitted it up and made it attractive to that part of the public which enjoys such sports, and invited baseball clubs to come there on Sundays to play matches, and placed around this ball ground a high fence to exclude spectators, except such as should pay an admission fee for the benefit of the defendant. That action afforded an opportunity for the complainants to assert their rights in this court, and I am of the opinion that they are entitled to relief by way of *interim* restraint upon the case as made.”<sup>816</sup>

The formation of a corporatized venture, such as public baseball matches, designed to attract crowds to a particular location, is a nuisance where those crowds create annoyance or discomfort to the neighbouring community. This principle applies to any publicly exhibited sporting event, such as, for example, a triathlon event or a surfing or surf lifesaving championship event. On Saturdays or Sundays residents and communities living adjacent

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<sup>814</sup> *Spiker v Eikenberry* 135 Iowa 79, 110 NW 457 (1907), citing *Seastream v New Jersey Exhibition Co* 67 NJ Eq 178; *Cronin v Bloemecke* 58 NJ Eq 313; and *R v Moore* 3 B & Ad 184; followed in *Casteel v Town of Afton* 227 Iowa 61, 287 NW 245 (1939) at pp 65-66.

<sup>815</sup> 67 NJ Eq 178 (1904) at pp 183-184 (Vice Chancellor Pitney).

<sup>816</sup> *ibid.*

beaches and parks are exposed to loud speakers announcing race calls and the names of participants in the sporting event, loud music, the noise of crowds of spectators, the noise of traffic transporting athletes, participants and spectators, and the littering of roads, beaches and parks. Triathlon events, surfing championship events, and surf lifesaving events, may impinge on the public right to public comfort or the public right to quietude by disturbing or annoying the public. These sporting events are susceptible to injunction as public nuisances at common law.

In *Dewar v City and Suburban Race Course Co*<sup>817</sup> horserace meetings held on Sundays were held to be a nuisance because the sport create a discomfort to inhabitants of the neighbourhood, by the shouting and cheering of the crowds collected on the course, and by the cries of the bookmakers, and by the noise of crowds going to and from the racetrack, and because the sport created an obstruction of the thoroughfares leading to the racetrack by vehicles conveying persons to and from the races, and by vehicles drawn up near the racecourse waiting for fairs. An injunction was granted to restrain horseraces from being held on Sundays on a racecourse adjoining a residential locality. The plaintiffs lived in a residential area in Dublin, in the vicinity of the ground where the horseraces were held. The defendant company owned and operated the racecourse. The Vice-Chancellor was satisfied that the evidence of the plaintiffs established a nuisance: “On full consideration of the evidence... I have arrived at the conclusion, that the plaintiffs have sufficiently established that the setting up of this racecourse and the holding of horseraces there, especially on Sundays, constituted a nuisance to the plaintiffs and other inhabitants in the neighbourhood, and that this nuisance is of a grave character, materially interfering, during the holding of the races, with the comfort and enjoyment of their houses, and is one which they are entitled to call on this court to prevent.”<sup>818</sup> In granting an injunction to restrain the defendant company from conducting horseraces on their racecourse the court noted, “the many different inconveniences suffered by them from the races, the noise of shouting, cries of bookmakers, trespasses to their gardens and walls by persons scrambling for places of view, obstruction to the roads and streets by cars and carriages drawn up waiting for fares, crowds outside the racecourse as well as inside it, persons staring in at their back windows looking upon the

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<sup>817</sup> [1899] 1 IR 345.

<sup>818</sup> *ibid* at pp 356-357.

racecourse, rude remarks by persons inside and outside the course, tables for roulette and other gambling, throwing of empty bottles into their gardens, and other matters...”<sup>819</sup>

Speaking of neighbourhood wherein was established the racecourse, the Vice-Chancellor said: “It is a most unsuitable place for setting up a course for horseracing; and from its situation it would be impossible to prevent its creating disturbances to the quietness and comfort of the inhabitants of the houses adjoining it, no matter how carefully it was managed. The very object of it was to attract large crowds to the place;... for the purpose of making profit, and could only be made by attracting large crowds, and giving them free scope for their enjoyment, a considerable portion of which would naturally lead to noisy shouting and cheering. But it is not only within the enclosure that this would take place; for the crowds, some on foot and some in vehicles of various kinds, who would be seen to hurry to its entrances, would be productive of further noise and disturbance... The vehicles, waiting for fares, would, of course, be drawn up along the roads or streets approaching the racecourse, and add another material element of noise and obstruction. It seems to me that without any proof of this state of things having actually existed, it might have been anticipated that it would exist from the establishment of such an entertainment in such a locality.”<sup>820</sup>

The issue for the court was whether a public sport that is staged “for the purpose of making profit,” and thereby “attracting large crowds, and giving them free scope for their enjoyment” ought to be allowed free reign to create discomfort and annoyance to the public. The Vice Chancellor concluded: “...one man may consider certain facts as necessarily causing disturbance to the comfort and quiet of the district, while another may esteem these same facts as having no such effect, and a third may regard them as even enjoyable. Cases of this kind are not to be dealt with here according to peculiar sensibilities or tastes, but according to the common sense of reasonable men. No majority, however large, is entitled to interfere with the common right of a minority, though small, to the enjoyment of the

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<sup>819</sup> *ibid* at p 353.

<sup>820</sup> [1899] 1 IR 345 at pp 352-353.

comfort and quiet of their homes, and the free use of the public thoroughfares which lead to them. The Legislature alone, acting for the common weal, has this power entrusted to it.”<sup>821</sup>

*Dewar v City and Suburban Race Course Co* highlights two distinct factual circumstances concomitant with sport which create a public nuisance: obstruction of the highway, and discomfort and annoyance to the public caused by crowds and noise.

The issue of crowds attendant at public sporting events creating public nuisance involves not only considerations of public order, but also considerations of degree. In order to establish nuisance it must be shown that there has been substantial inconvenience, obstruction, annoyance, interference, or discomfort to the public. A community might tolerate annoyance or discomfort on isolated or intermittent occasions, but increased commercialised sports practises in which crowds of spectators are drawn on numerous occasions for the sake of profit for the sport promoting the matches may create circumstances which are an annoyance or discomfort to the public warranting abatement as a public nuisance. The appropriate person to monitor this situation is not the individual persons residing near or adjacent stadia or public areas where sports take place. Rather, the appropriate person to monitor this situation is the Crown, the Executive Government, who, consistent with their constitutional role as *parens patriae*, is obligated to protect the public wellbeing in paramouncy to facilitating the commercial interests of corporatized sports entities utilising public areas to ply their trade.

### 3. Publicly exhibited sporting events may create annoyance or discomfort even when complying with municipal laws

In *State of New York v Waterloo Stock Car Raceway Inc* “action [was] brought by the State of New York, for itself and as *parens patriae* on behalf of the citizens of New York, seeking to enjoin permanently the use of certain property in the Village of Waterloo for stock cars.”<sup>822</sup> The case thus represents a classic example of the ex officio use of civil proceedings, by the

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<sup>821</sup> *ibid* at p 356.

<sup>822</sup> 96 Misc 2d 350, 409 NYS 2d 40 (1978) at pp 351-352 of the former report.

Attorney-General, for abatement of a sport creating a public nuisance. Noise, dust, and danger to public safety justified the holding that the operation of the racetrack for motorcar races was a public nuisance. The noise levels during races were of such magnitude as to exceed the Environmental Protection Agency maximum acceptable sound level by a wide margin. The nearly universal description of the noise was that of a constant roar. As a consequence of this audio intrusion upon their lives, the witnesses testified to a serious alteration of their lifestyles in a futile attempt to adapt. Some would keep their windows closed regardless of the heat, others would make it a point to absent themselves from their homes on race nights, and most of them had been forced to cease using their out-of-doors property for entertainment of guests or for recreation on these nights. A common complaint was that sleep both for the adults and their children had been inhibited. The Supreme Court also affirmed the trial court's finding that there was a definite danger of safety in the vicinity of the raceway from launched projectiles. Undisputed testimony was had at trial that at one time a racing tire flew across the street and hit a witness' garage, and that on other occasions steel guide rails had fallen apart upon impact from the autos and had been projected as far as the public street.

The defendant company in *State of New York v Waterloo Stock Car Raceway Inc* argued that the use of the racetrack was in full compliance with zoning ordinances, and that owing to this fact they were not liable in nuisance. But the Supreme Court held that even if a sport complies with zoning ordinances, it may still be enjoined as a nuisance.<sup>823</sup> The court concluded: "This court concludes that while there is nothing unlawful about the operation of a stock car raceway under proper circumstances, its use at its present location in the Village of Waterloo, under all the circumstances, constitutes a public nuisance and should be discontinued. 'A nuisance may be merely a right thing in the wrong place.'"<sup>824</sup>

In a more recent decision, the Appellate Division of the Supreme Court of New York has gone further and held that the fact that the defendant company receives both an operating permit required by the local law governing motor vehicle racing, and a special use permit necessitated by the zoning law, to operate the racetrack, does not bar an action by the

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<sup>823</sup> *ibid* at p 358, citing *Little Joseph Realty v Town of Babylon* 41 NY 2d 738, Court of Appeals of New York (1977).

<sup>824</sup> *ibid* at p 359.

plaintiffs alleging that an automobile race track is a public nuisance. Nor are plaintiffs barred from bringing a suit at common law by res judicata because of an earlier action instituted by them challenging the permitting process.<sup>825</sup> Even where a sport meets all requirements of local planning laws and environmental laws for the place where the sport is practised, it may still amount to a public nuisance at common law and warrant abatement. In *Laing v St Thomas Dragway*, Morissette J. in the Ontario Superior Court of Justice noted, in reference to a nuisance created by a dragway: “The fact that both the municipality and the Ministry have approved the operation of the dragway does not in and of itself preclude a finding of nuisance.”<sup>826</sup> The question is one of fact and degree. To avoid proscription as a public nuisance a sport must be conducted in such a manner as to accord with the sensibilities of the locale wherein it is practised, irrespective of municipal approval. Only express statutory terms authorising the particular sport at the particular location or stadium where it is practised at a particular time, at the behest of legislation from the sovereign Parliament of the state wherein the sport is practised, will enable a sport which might otherwise be a nuisance to be conducted lawfully. The only way to authorize a publicly exhibited sporting event which creates a public nuisance is to “shelter” the public nuisance in express legislation: *Hill v City of New York* 139 NY 495, 34 NE 1090, 1092 (1893) (“The authority which will thus shelter an actual nuisance must be express . . . For, consider what the proposition is. It upholds a positive damage to the citizen and denies him any remedy . . . Surely, an authority which so results should be remarkably strong and clear.”) Absent such definite legislation, the numbers of occasions when the sport is practised, the noise levels actually generated by the sport when it is practised, and the times at which the sport is practised, may be facts which create an annoyance or discomfort to the public, and thus a public nuisance.

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<sup>825</sup> *Citizens of Accord v Twin Tracks Promotions* 236 AD 2d 665, 653 NYS 2d 717, Appellate Division of Supreme Court (1997).

<sup>826</sup> [2005] 2005 ACWSJ 1385, 136 ACWS (3d) 776, at para [57].

#### 4. Publicly exhibited sporting events may create annoyance and discomfort where they escalate in occurrence

A sport which has been habitually practised at a stadium or some other location open to the public, on an occasional recurrent basis, such as one game once per week, may create a public nuisance should the sports promoters increase the number of games played at the stadium or location, or by conducting games at night, for example. The question as to whether an increase level of sports activity at any particular location or stadium amounts to a nuisance is a question of fact and degree. In *Sherrod v Dutton*,<sup>827</sup> the Court of Appeals of Tennessee reversed the trial court's dismissal of a nuisance claim against a go-cart racetrack and ordered that a permanent injunction issue to restrain the racetrack operators from conducting races at night.<sup>828</sup> The injunction further required the defendant to pave the access road to the racetrack and water the track as frequently as necessary to prevent unreasonable dust during races. In *Attorney-General of British Columbia v Haney Speedways Ltd*,<sup>829</sup> the British Columbia Supreme Court granted an injunction against the operation of motorcar races on the relator action of seven families living near a motorcar racetrack. In so doing the court referred, with approval, the dictum of Cozens-Hardy L.J. in *Rushmer v Polsue & Alfieri Ltd* where his Lordship noted that a nuisance may be created by new or fresh circumstances in contrast to that which has been habitual and tolerable:

“It was strenuously contended... that a person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. I cannot assent to this

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<sup>827</sup> 635 SW 2d 117 (1982).

<sup>828</sup> In so holding the Court of Appeals referred, with approval, to *Gilbough v West Side Amusement Co* 64 NJ Eq 27, 53 A 289 (1902) where it was stated: “That mere noise may be so great...as to amount to an actionable nuisance...is thoroughly established. The reason why a certain amount of noise is or may be a nuisance is that it is not only disagreeable, but it also wears upon the nervous system and produces that feeling which we call ‘tired’... Another reason is that mankind needs rest and sleep, and noise tends to prevent both... Mankind needs sleep for a succession of several hours once in every 24 hours, and nature has provided a time for that purpose, to wit, the nighttime, and by common consent of civilized man the night is devoted to rest and sleep, and noises which would not be adjudged nuisances... if made in the daytime, will be declared to be nuisances if made at night and during the hours which are usually devoted by the inhabitants of that neighbourhood to sleep.” (53 A 289 (1902) at p 289).

<sup>829</sup> [1963] 39 DLR (2d) 48 (BCSC).

argument. A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it. This idea is expressed by Thesiger L.J. in *Sturges v Bridgman*, 11 Ch.D. 852, when he said that what might be a nuisance in Belgrave Square would not be a nuisance in Bermondsey. But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to create a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short, if a substantial addition is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy, and that the defendant's machinery is of first-class character.”<sup>830</sup>

The effect of this dictum is that even though a local community may tolerate, or become accustomed to, occasional recurrent sporting events in an adjacent stadium or at an adjacent beach or park, such local community is not obliged to then tolerate a “fresh”, new, or increased level of noise merely because a sports association desires to utilise a stadium more frequently for more sports tournaments to maximize their profit, or merely because a sports association desires to increase the ‘entertainment’ experience of the publicly exhibited sporting event by playing music or allowing commentators to talk over loud speakers. This principle is applicable even when the focus of a local community is the sports stadium or arena itself, and most definitively applies where a sports association desires to expand its sport to new communities.

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<sup>830</sup> [1906] 1 Ch 234 (CA) at pp 250-251, affirmed [1907] AC 121 (HL), followed in *Attorney-General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (BCSC) at p 53 (Brown J).



The use of stadiums or sports grounds for purposes other than what they have been habitually used for may create a nuisance. A publicly exhibited sporting event may become a public nuisance if the manner of exhibition changes. A “fresh” or new or increased level of noise concomitant with such purpose may create a nuisance in that it is a discomfort or annoyance to the neighbourhood in which the stadium is located. This was the issue in *Stretch v Romford Football Club Ltd*,<sup>831</sup> where the defendants, who occupied the Brooklands Stadium in Romford, England, promoted and conducted motorcar speedway races in the summer months, on Thursday evenings from May to October from 7.30 p.m. to about 9.30 p.m., supplemental to the football matches that were habitually played at the stadium. Whilst the football matches generated noise, this noise was tolerated by the neighbourhood in which the stadium was situated. When a totally different sport from football was promoted and conducted at the stadium, namely motorcar speedway racing, this sport generated noise which was not tolerable to the neighbourhood. Justice Goff followed the rule laid down by Knight Bruce VC in *Walter v Selfe*, followed more recently in *Laing v St Thomas Dragway*, that the evidence of a nuisance must be adjudged “not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people.”<sup>832</sup> The plaintiff, who was a resident of the quiet neighbourhood adjoining the Brooklands Stadium, complained of the overall noise created by the use of the stadium for speedway racing, in contrast to the noise generated from football matches that took place at the stadium. The plaintiff was particularly distressed by the revving of motorcycle engines which took place both before and during races. The defendants had carried out certain remedial measures with their loudspeakers, including setting the volume control at a lower level, and erecting an 8-ft-high sound-shielding fence along the top of the bank adjoining the plaintiff’s premises. But the court was of the view that these measures were clearly

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<sup>831</sup> [1971] EGD 763.

<sup>832</sup> (1851) 4 De G and Sm 315 at p 322; 64 ER 849 at p 852 (Knight-Bruce VC). Vice Chancellor Bruce-Knight’s dictum in *Walter v Selfe* was referred to with approval in *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR 482 at p 486 (Jordan CJ), and followed in *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, 136 ACWS (3d) 776 at para [41]. In *Walter v Selfe*, Knight-Bruce VC said: “Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?” See also *Attorney-General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (BCSC) where Justice Brown states, at p 52, referring to *Goltan v De Held*, 21 LJ Ch 167, that the test as to what is a nuisance is an inconvenience materially interfering with the ordinary comfort physically of human existence according to plain, sober, and simple notions.

insufficient, and the plaintiff was entitled to a perpetual injunction. His Lordship arrived at the conclusion, from the evidence, that overall there had been a substantial increase in noise from that occasioned by football matches at the stadium. Justice Goff held that the plaintiff was entitled to an injunction against speedway races that took place at the stadium. It had been argued on behalf of the defendants that speedway gave pleasure to many people. Yet, Justice Goff held that the defendants were carrying on a business, and were not entitled to carry it on in such a way as to interfere substantially with the ordinary notions of comfort in the plaintiff's house and garden, however many people might derive pleasure from it, and however well run it might be. The injunction restrained the defendants and each of them, by themselves, their servants or agents or otherwise howsoever, from causing or permitting speedway racing at Brooklands Stadium.

## 5. Concluding remarks

Publicly exhibited sports may create public nuisances by causing annoyance or discomfort to the public either directly or indirectly. The public right which is impinged upon in circumstances where public exhibitions of sport cause annoyance or discomfort is the public right to quietude or the public right to comfort.<sup>833</sup> Publicly exhibited sporting events may create a public nuisance directly because of the noise generated by the sporting activity, such as motorsport racing,<sup>834</sup> or by projectile objects such as golf balls or baseballs.<sup>835</sup> Publicly exhibited sporting events may also create a public nuisance indirectly because of the noise

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<sup>833</sup> Public comfort is identified by the Supreme Court of Illinois as a public right: *City of Chicago v Beretta USA Corporation* 213 Ill 2d. 351, 821 NE 2d 1099 (2004), at p 370 of the former report (Garman J).

<sup>834</sup> *Attorney-General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (BCSC); *Town of Bedminster v Vargo Dragway Inc* 434 Pa 100, 253 A 2d 659 (1969); *Jones v Queen City Speedways Inc* 276 NC 231, 172 SE 2d 42, Supreme Court of North Carolina (1970); *Stretch v Romford Football Club Ltd* [1971] EGD 763; *State of New York v Bridgehampton Road Races Corp* 44 AD 2d 725 (1974); *State of New York v Waterloo Stock Car Raceway Inc* 96 Misc 2d 350, 409 NYS 2d 40 (1978); *Sherrod v Dutton* 635 SW 2d 117 (1982); *Hoover v Durkee* 212 AD 2d 839, 622 NYS 2d 348 (1995); *Wheeler v Lebanon Valley Auto Racing Corp* 303 AD 2d 791, 755 NYS 2d 763 (2003), appeal denied 100 NY 2d 507, 795 NE 2d 39 763 NYS 2d 813 (2003); *West v Luna* 2003 Tenn App LEXIS 968 (Tenn Ct App, 6 January 2003), appeal denied *West v Luna* 2004 Tenn LEXIS 750 (Tenn, 7 September 2004); *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, 136 ACWS (3d) 776.

<sup>835</sup> *Sans v Ramsey Golf & Country Club Inc* 29 NJ 438, 149 A 2d 599 (1959); *Campbelltown Golf Club Limited v Winton* [1998] NSWSC 257 (New South Wales Court of Appeal, 23 June 1998).

and behaviour of crowds attending as spectators to the publicly exhibited sporting event.<sup>836</sup> Compliance with local or municipal laws by the promoters or managers of the publicly exhibited sporting event will not prevent a finding of public nuisance.<sup>837</sup> Common law public nuisance exists, insofar as it is relevant to sport, to protect public rights and to limit the excesses of unregulated commercialized and profit motivated sports practice.<sup>838</sup> In no area is this as stark as in the precedents concerning the public right to quietude. In these precedents, the sports events in question drew together great numbers of people which proved generally annoying or discomforting to the places adjacent to where the sports events were staged. A commercialised and profit driven approach to sports practice, wherein there is a proliferation of sporting fixtures attracting crowds and noise and supplemental entertainment products such as music and dancing, in order to maximum financial gain, may more readily create circumstances which amount to a public nuisance. Publicly exhibited sporting events may cause annoyance and discomfort to the public and be declared a public nuisance on a single, isolated occasion,<sup>839</sup> or by a continuing state of affairs,<sup>840</sup> or by an increase in the degree of sport exhibited or manner of exhibition.<sup>841</sup> The same is true of theatres and playhouses.<sup>842</sup> To this might be added, in relation to modern urban

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<sup>836</sup> *R v Moore* (1832) 3 B & Ald 184; *Bostock v North Staffordshire Railway Co* (1852) 5 De G & Sm 584, 64 ER 1253; *Bellamy v Wells* (1890) 60 LJ Rep Ch NS 156; *Dewar v City and Suburban Race Course Co* [1899] 1 IR 345; *Cronin v Bloembecke* 58 NJ Eq 313 (1899); *Seastream v New Jersey Exhibition* 67 NJ Eq 178 (1904) at pp 183-184 (Vice Chancellor Pitney); *Gilmour v Green Village Fire Department Inc* 2 NJ Super 393, 63 A 2d 918 (1949).

<sup>837</sup> *State of New York v Waterloo Stock Car Raceway Inc* 96 Misc 2d 350, 409 NYS 2d 40 (1978); *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, 136 ACWS (3d) 776.

<sup>838</sup> In earlier times common law public nuisance existed to limit the excesses of unregulated and profit motivated corporations who pursued greed without moderation and without consideration for the impact of their actions upon local communities adjacent their business premises: *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169; [1957] 1 All ER 894 (CA).

<sup>839</sup> See *Aldridge v Van Patter* [1952] OR 595 at p 610 where it was said: "All wrongful escapes of deleterious things, whether continuous, intermittent, or isolated, are equally to be classed as nuisances in law; for they are all governed by the same principles." *Gleeson v Hillcrest Golf Course Inc* 148 Misc 246, 265 NYS 886 (1933). In *Johnson v City of New York* 186 NY 139, 78 NE 715 (1906), the holding of a single motorcar race on a single occasion was opined to be a nuisance per se by the Court of Appeals of New York: at p 146. See also *Matheson v Northcote College Board of Governors* [1975] 2 NZLR 106. See also *Holling v Yorkshire Traction Company Ltd* [1948] 2 All ER 662 (Court of Appeal) and *Dollman v Hillman Ltd* [1941] 1 All ER 355 (Court of Appeal).

<sup>840</sup> See *Castle v St. Augustine's Links Ltd* (1922) 38 TLR 615 where the evidence was to the effect that golf balls were very frequently sliced on to or over the public highway from the 13<sup>th</sup> tee. There was evidence of substantial interference with the use and enjoyment of the road. See also *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 at p 182, [1957] 1 All ER 894 at p 900.

<sup>841</sup> *Attorney-General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (BCSC); *Stretch v Romford Football Club Ltd* [1971] EGD 763.

<sup>842</sup> *Betterton's Case* rep Temp Holt 538; *Barber v Penley* [1893] 2 Ch 447 at p 449, cited in *Russell on Crime* vol 1 at p 1734.

environments, dance clubs, rave music events, and such like.<sup>843</sup> A single publicly exhibited sporting event such as a surfing championship event which draws a crowd of 100,000 spectators to the beach to witness surfing,<sup>844</sup> may cause annoyance or discomfort to the public (being comprised of the residents and local community living in the locale where the surfing championship is staged) and may be declared a public nuisance at common law.

Excessive public exhibitions may, indeed, create a circumstance that proves annoying or discomforting to the people generally. Sports may be public nuisances when conducted too often, when conducted at certain times or days, or when conducted at certain places. The character of the locality where the publicly exhibited sporting event is staged, or is proposed to be staged, is of relevance in determining whether there is annoyance or discomfort.<sup>845</sup> Above all, no majority, however large, is entitled to interfere with the common right of a minority to the enjoyment of the comfort and quiet of their homes, and the free use of the public thoroughfares which lead to them. The Legislature alone, acting for the whole State, has this power entrusted to it.<sup>846</sup>

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<sup>843</sup> *R v Shorrock* [1993] 3 WLR 698 (CA).

<sup>844</sup> 100,000 spectators occupied Huntington Beach in California to watch the 2004 US Surfing Open: 'Taj, Chelsea Grab US Titles' *Sunday Mail* (Australia, 8 August 2004) at p 64.

<sup>845</sup> *Walker v Pioneer Construction Co Ltd* (1967) 56 DLR (3d) 677 at p 680 (Morden J); followed in *Laing v St Thomas Dragway* [2005] OJ No 254, 2005 ACWSJ 1385, [2005] 136 ACWS (3d) 776 at para [38].

<sup>846</sup> *Devar v City and Suburban Race Course Co* [1899] 1 IR 345 at p 356.

## Chapter 13

### Public sporting events endangering public safety, public health, or the life of the public

A public exhibition of sport that endangers public safety, public health, or the life of the public is a public nuisance at common law. The definitions of public nuisance discussed in Chapter 5, supported by the decisions in *R v Rimmington*, *R v Goldstein*,<sup>847</sup> *City of Chicago v Beretta USA Corporation*,<sup>848</sup> state that an act or omission which endangers public safety, public health or the life of the public is a public nuisance. The public right which is impinged upon by acts or omissions endangering the safety, health or life of the public are the public right to safety, the public right to public peace, the public right to health, and the public right to life.<sup>849</sup>

Public exhibitions of sports have long been attendant with danger and the courts have long recognised this fact. Courts have often noted the inherent danger in sport. The deaths and injury of competitors, and of spectators and the public generally, has been recorded in court reports. The death of a football player in a match played between football clubs under the Association Rules was the subject of a prosecution in *R v Bradshaw* and in *R v Moore*.<sup>850</sup> A terrible accident in a motorcar race in which two spectators were killed and several injured when a car shot into the air and off the course, travelling for a dozen yards, over rails by the side of the track into a crowd of spectators was the cause of litigation in *Hall v Brooklands Auto Racing Club*.<sup>851</sup> Lord Justice Scrutton commented in *Hall v Brooklands Auto Racing Club*

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<sup>847</sup> [2005] UKHL 63, [2006] 1 AC 459, [2005] 3 WLR 982, [2006] 2 All ER 257.

<sup>848</sup> 213 Ill 2d. 351, 821 NE 2d 1099 (2004) at p 369 of the former report.

<sup>849</sup> *ibid.*

<sup>850</sup> *R v Bradshaw* (1878) 14 Cox CC 83; *R v Moore* (1898) 14 TLR 229.

<sup>851</sup> [1933] 1 KB 205

that the dangers of public exhibitions of sports are numerous: “A spectator at Lord’s or the Oval runs the risk of being hit by a cricket ball, or coming into collision with a fielder running hard to stop a ball from going over the boundary, and himself tumbling over the boundary in doing so. Spectators at football or hockey or polo matches run similar risks both from the ball and from collisions with players or polo ponies. Spectators who pay for admission to golf courses to witness important matches, though they keep beyond the boundaries required by the stewards, run the risk of players slicing or pulling balls which may hit them with considerable velocity and damage.”<sup>852</sup> Ibrox and Hillsborough, in which scores of spectators were killed, were disasters closely associated with lack of effective regulation in publicly exhibited sporting events.<sup>853</sup> Between 1933 and 1976 organised football in the United States claimed the lives of 1,198 participants.<sup>854</sup>

Publicly exhibited sporting events may create a public nuisance by endangering public safety, public health or the life of the public in either a direct or an indirect manner. Directly, public sports may endanger public safety, health or life where equipment used in the sporting contest injures, maims or kills spectators or other members of the public. Indirectly, publicly exhibited sporting events may endanger public safety, health or life where the sport draws violent or riotous crowds to the harm of spectators of the sporting event or to residents and communities living in the locale where the sporting event is staged. Both circumstances are now discussed.

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<sup>852</sup> *ibid* at p 209.

<sup>853</sup> See Justice Popplewell Committee of Inquiry into Crowd Safety and Control at Sports Grounds Final Report (Cmnds 9710). At p 2 of the Final Report the author states: “the paramount need is to protect the public by improving safety standards, and thereby restoring confidence among those who attend sporting events. This means that effective steps should be taken quickly. In this belief I commend my findings and recommendations for your consideration.” See further the litigation arising from the Hillsborough disaster: *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. Hillsborough Football Stadium in Sheffield on 15 April 1989, when 95 spectators died and hundreds more were injured, one fatally, as a result of crushing sustained in Spectator Pens 3 and 4 at the Leppings Lane end of the Stadium. Lord Taylor’s final report was delivered on 18 January 1990 and included a number of recommendations relating to crowd control and safety at sporting events.

<sup>854</sup> J Yates and W Gillespie ‘The Problem of Sport Violence and the Criminal Prosecution Solution’ (2002) 12 *Cornell J L & Pub Pol’y* 145 at p 148, citing RB Horrow ‘Violence in Professional Sports: Is it Part of the Game?’ (1982) 9 *J Legis* 1 at p 1.

## 1. Publicly exhibited sporting events endangering public safety, health or life, directly

Publicly exhibited sporting events may pose a direct threat, not by virtue of noise or crowds, but by virtue of the very nature of the game itself and the inherent dangers of the game. In *Castle v St Augustine's Links*,<sup>855</sup> the use of a golf tee and golf fairway constituted a public nuisance because golf balls often strayed onto the public highway. On the facts of the case golf balls hit cars, broke windscreens and endangered the safety and lives of motorists. The same was the holding of courts in New York in *Gleason v Hillcrest Golf Course Inc*,<sup>856</sup> and *Townsley v State of New York*.<sup>857</sup> In the *Townsley* case, the plaintiff was driving in her car on the highway when a golf ball struck her. She contended that the 18<sup>th</sup> hole of the golf course, with its fairway running parallel and immediately adjacent to the highway, constituted a menace and public nuisance to travellers using the highway. The court agreed with her argument. The court noted that the driver had the right to the free and unmolested use of the highway.<sup>858</sup> In *Gleason v Hillcrest Golf Course Inc*, the court said: "Like baseball, the golf game is not a nuisance *per se*. Both games involve the same element, *ie*, striking the ball with an instrument with force so as to send it spinning into the air. If, however, the ball playing is attended with a reasonable degree of danger, as to make it likely that it would 'work hurt' upon a traveller in the street, a question of fact is presented, and if it be decided adversely to the parties who are responsible for, or who participated in, or who authorized the setting of the ball in motion, liability will attach on the theory that the playing was a nuisance."<sup>859</sup> The key question for the court, then, was whether the degree of danger associated with the situation of the golf hole and the sport in question was such that, as a matter of fact, it created a public nuisance. The court noted that the precedent of *Castle v St Augustine's Links Ltd* was directly on point. The New York Court followed the holding of the English King's Bench in *Castle v St Augustine's Links Ltd*, where it was stated that a plaintiff could "...recover from the golf club on the theory that the particular portion of the grounds was a public nuisance under the conditions and in the place where it was situated. It was said that the

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<sup>855</sup> (1922) 38 TLR 615.

<sup>856</sup> 148 Misc 246, 265 NYS 886 (1933).

<sup>857</sup> 6 Misc 2d 557, 164 NYS 2d 840 (1957).

<sup>858</sup> 6 Misc 2d 557 at p 558.

<sup>859</sup> 148 Misc 246 (1933) at p 249.

club was under a duty to obviate the danger to persons upon the highway and that this could be done in several ways, as by having a lesser number of holes, or omitting the objectionable hole, or playing it in a different way. Those features and the theories upon which liability was predicated appeal to me as justifiable both upon reason and authority, and applicable to the facts at bar.”<sup>860</sup>

To sports purists, the idea that a golf tournament ought to be conducted over only 17 holes rather than 18 holes is anathema. Yet this is the response of the common law where a public nuisance is created by projectile golf balls endangering public safety, public health or the life of the public. The suggestion from *Gleason v Hillcrest Golf Course Inc* and *Castle v St Augustine’s Links Ltd* that a sport must change its course, layout, or manner of play, or omit playing a particular part of the game, such as a golf hole, where a public nuisance is created, has been adopted by more recent authority.<sup>861</sup> In *Challen v McLeod Country Golf Club*, the Court of Appeal of Queensland found that: “Even two or three balls per week regularly coming onto the appellant’s property with the risk of physical harm or damage to persons or property on the appellant’s premises is a material interference with the enjoyment of the appellant of her property.”<sup>862</sup> Although an action in private nuisance, the court was of the opinion that golf balls hit into the plaintiff’s property was a threat to physical safety.<sup>863</sup> In this case, action by the respondents changing the layout of the 12<sup>th</sup> hole on the golf course (the hole the cause of the nuisance), at a cost of \$26,000, prior to the litigation, obviated the need for an injunction. The Court of Appeal awarded damages. And in *Schneider v Royal Wayne Motel Ltd*,<sup>864</sup> the

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<sup>860</sup> *ibid* at p 253.

<sup>861</sup> See eg *Lester-Travers v City of Frankston* [1970] VR 2; *Pringle v Ryde-Parramatta Golf Club* (NSW Court of Appeal, 23 February 1978) (Helsham CJ); and more recently *Campbelltown Golf Club Limited v Winton* (NSW Court of Appeal, 23 June 1998). See also *Champagne View Pty Ltd v Shearwater Resort Management Pty Ltd* [2000] VSC 214, Supreme Court of Victoria.

<sup>862</sup> [2004] QCA 358 at para [39] (Justice Mullins). The evidence in this case was that about 20 golf balls landed on the appellant’s premises per week causing damage to roof tiles, a fountain, garden furniture, windows, and a garage door over a number of years (at paras [7]-[15]). The appellant collected some 526 over a 12 month period. For a contrary viewpoint see *Hellman v La Cumbre Golf & Country Club* 6 Cal App 4<sup>th</sup> 1224, 8 Cal Rptr 2d 293 (1992), where the Court of Appeals of California held that the use of a golf hole on a golf course did not amount to a nuisance because the appellants knew that golf balls landed on property next to golf courses when purchasing their land or home, and also because the number of balls being hit onto the appellants’ premises (about 5 to 10 golf balls every week) was about the same every week. The Court of Appeal of California found that the nature and extent of the injury caused was not so unreasonable as to support an action for nuisance.

<sup>863</sup> [2004] QCA 358, at para [39] (Mullins J).

<sup>864</sup> (1995) 27 Alberta Law Reports (3d) 18, followed in *Transcona Country Club v Transcona Golf Club (1982) Inc* [2000] MBQB 22.



plaintiffs owned homes adjacent to a golf course which had existed when they bought their homes. Over the years many golf balls had been driven into their yards and had hit their homes and vehicles. There were as many as 321 such incidents in one season. The golf course took action to attempt to alleviate the problem by moving a green and erecting a fence. Unfortunately this action only met with modest success. The court concluded that the plaintiffs were subjected to a nuisance emanating from the golf course. The fact that the golf course had taken steps to alleviate the nuisance, although possibly relevant with respect to damages, was not sufficient to vitiate the plaintiff's claim. While the plaintiffs' bought their homes knowing of the existence of the course, that did not excuse the golf course's continued intrusion. The golf course did not acquire the right to commit a nuisance by existing prior to the plaintiffs' purchase of the adjacent property.

In *Transcona Country Club v Transcona Golf Club (1982) Inc.*,<sup>865</sup> Hanssen J in the Manitoba Court of Queen's Bench discussed several decisions of the courts in Canada, Australia, England and America on nuisance liability, holding that the defendant Golf Club was liable in nuisance because its use of a golf course substantially and unreasonably interfered with the plaintiff's use and enjoyment of their land. On the facts, golf balls struck the plaintiff's premises on four occasions breaking windows. Precedents relied upon by the Manitoba court included: *Miller v Jackson*,<sup>866</sup> where the Court of Appeal of England and Wales found a cricket club liable in nuisance because balls from a cricket ground entered the plaintiffs' yard and hit their house; *Lester-Travers v The City of Frankston*,<sup>867</sup> where the defendants were found liable in nuisance because some 36 golf balls played by golfers on two holes and the practice fairway landed on the plaintiff's property, some striking her house and others simply landing in her grounds; and *Cook v Lockeport (Town)*,<sup>868</sup> where the court had found the operator of a baseball diamond liable in nuisance as a result of baseballs going onto the plaintiff's property and had issued an injunction restraining the activity.<sup>869</sup>

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<sup>865</sup> [2000] MBQB 22.

<sup>866</sup> [1977] 1 QB 966 (Court of Appeal, UK).

<sup>867</sup> [1970] VR 2.

<sup>868</sup> [1971] NSJ No 19.

<sup>869</sup> Other cases cited by Hanssen J in *Transcona Country Club v Transcona Golf Club (1982) Inc* [2000] MBQB 22 were *Segal and Segal v Derrick Golf & Winter Club* (1977) 2 CCLT 222; *Hann v Blomidon Golf Club* [1994] NJ No 230; and *Wilson v Fawcett* [1970] OJ No 526.

In other cases, courts have refrained from finding, as a matter of fact, that a baseball hit from a park and into the public street injuring a pedestrian was an actionable nuisance: *Young v The New York, New Haven & Hartford Railroad Co.*<sup>870</sup> And in *Stone v Bolton*, discussed above in Chapter 5, the Court of Appeal of England and Wales refused to find that a cricket ball hit from a cricket ground into the public highway injuring the plaintiff was a public nuisance. The decision in *Stone v Bolton* and the subsequent decision of the House of Lords in *Bolton v Stone* are not consistent with the case law on projectiles from sports grounds. The issue as to the liability of the owner's, occupiers, or operators of a sports ground or sports facility from which balls or vehicles are projected into a public highway or public park, for public nuisance, has perhaps yet to be conclusively adjudged by an appellate court.

The determination as to whether a sporting event creates a public nuisance by endangering public safety, health or the life of the public, is often a cumbersome exercise requiring a court to make a choice between competing interests. This was made clear recently in *McGuire v New Orleans City Park Improvement Association*,<sup>871</sup> where the Supreme Court of Louisiana dismissed a negligence suit by a jogger who had part of his right testicle removed as a result of being hit by an errant golf ball. The plaintiff was running, for exercise, along a road which traversed a golf course. The difficulty which this case highlights is one which endeavours to balance the social benefits gained from sport against the inherent dangers associated with the sport. The effect of the decision is to relegate the sport of running – which may be a natural right in and of itself, being a physical activity of benefit to man – to an inferior status to golf, in the location of a golf course. This is a difficult call. And perhaps, alike the Court of Appeal of England and Wales in *Stone v Bolton*,<sup>872</sup> the Louisiana Supreme Court viewed the sport the subject of the case with partiality.<sup>873</sup> In *Stone v Bolton* the sport was cricket. In *McGuire* the sport was golf. The Supreme Court in *McGuire* was persuaded by the fact that the place where the plaintiff was running was designated for golf, the golf course having been in existence for over 75 years, and signs having been erected at

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<sup>870</sup> 136 AD 730, 121 NYS 517, Supreme Court of New York Appellate Division (1910).

<sup>871</sup> 835 So 2d 416 (2003).

<sup>872</sup> [1950] 1 KB 201, [1949] 2 All ER 851. See nn 98-110 and accompanying text.

<sup>873</sup> The dicta in *Stone v Bolton*, along with that of Lord Denning in *Miller v Jackson* [1977] QB 966 at p 976, [1977] 3 All ER 338 at p 340, where he states that, “In summertime village cricket is the delight of everyone”, have prompted judicial comment that they represent “a concession to cricket as a national sport of England” rather than a principled application of the law: *Wilkinson v Joyceman* [1985] 1 Qd R 567 at p 590 (McPherson J), cited in *Woods v Multisport Holdings Pty Ltd* [2002] HCA 9, (2002) 186 ALR 145, at n 44 (Kirby J).

the entrances to the golf course warning entrants of golf activity. The plaintiff was not a trespasser on the golf course because the road on which he was running was open to the public.

The situation may be very different where golf balls, or any other ball used in a sport, are projected out of the field of play and into an adjacent public utility such as a public park or a public road; rather than where members of the public are injured when traversing a course itself by using a public road, as was the facts in *McGuire*. Had the plaintiff been jogging on an adjacent public highway or in an adjacent public park when he was hit, the golf course owners would have been liable for creating a public nuisance following the decisions in *Gleason v Hillcrest Golf Course Inc* and in *Castle v St Augustine's Links Ltd*. Yet by what reasonable application of the law should Ms Townsley succeed on grounds of public nuisance and Mr. McGuire fail? A public park, or a public highway, through which persons might jog, for exercise, enjoyment, and wellbeing, ought to be a place free from the threat to public safety or life posed by projectile golf balls from an adjacent golf course. Perhaps the decision in *McGuire* rests on the fact that the suit was brought in negligence and not on grounds of public nuisance as was the case in *Laing v Allen*.<sup>874</sup>

Had Mr. McGuire sued on grounds of public nuisance causing special damage to himself he might have succeeded. A launched projectile, under the circumstances in the *McGuire* case, albeit an accident and an inherent aspect of the sport of golf, would amount to a public nuisance. Liability for such public nuisance is absolute. The offence of public nuisance, as was indicated by Sir John Smith in his seminal work on criminal law, is essentially a crime of negligence.<sup>875</sup> The use of the golf hole in question endangered public safety and may thus be properly regarded as a public nuisance. The use of the golf hole by players of golf in such circumstances as *Castle*, *Gleason* etc is indiscriminate in its scope because any person using an adjacent public highway or public park for their own enjoyment or wellbeing might be physically harmed by an errant golf ball. Skewed, sliced, hooked, or wayward golf shots are common amongst players in the game of golf – even amongst professional players. Even the best golf players in the world hit their golf balls into trees, woods, forests, ponds, or

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<sup>874</sup> [2003] BCJ No 768.

<sup>875</sup> Sir John Smith *Smith & Hogan Criminal Law* (8<sup>th</sup> edn Butterworths London 1996) at p 775.

lakes, adjacent the fairways, or into the crowds of spectators observing the tournament. The people ought not to have to amend their free use of public parks, or public roads, or cease going to a public park or using public roads altogether, or keep constant watch in thin air for errant golf balls, simply because a golf hole is situated too close to such a public park or public road. In the *McGuire* case either the public road ought to be moved or the golf hole from which the errant golf ball was projected ought to be removed or changed. The case law suggests that in circumstances where a game of golf creates a public nuisance it is the golf game which must amend its practise so as not to further endanger public safety, public health or the life of the public.<sup>876</sup> Doing otherwise would be to relegate some other activity, such as jogging, picnicking in the park, or walking, or driving a motorcar, occurring on land beyond the strict confines of a golf course to an inferior status to the right to play golf. Under injunctive relief for public nuisance, a Golf Club would be required to change the layout of the golf hole, place natural or artificial screens, or omit playing the golf hole in question. In so mandating, a court is not suggesting that the game of golf cannot be played at all. Rather, the game of golf is allowable provided it not be played in such a manner as to endanger public rights. This is a most reasonable principle of law. The public ought to be able to walk, jog, practise yoga, play football, play catch, exercise, picnic, or rest, in a public park, or travel by foot, horse, motorcar or some other vehicle along the public roads without an endangerment to their safety created by errant golf balls from golf courses.

This is not an issue that ought to be left to private litigants. It is a public issue. The necessity to monitor the possible liability in public nuisance created by ball games at public parks or in public facilities, or at private facilities adjacent or adjoining public land would avoid the need to relegate one sport, such as ball sports, to an inferior status, to other sports.

It is not only golf which may endanger public safety, health or the life of the public directly. In *State of New York v Waterloo Stock Car Raceway*,<sup>877</sup> danger to public safety justified the holding that the operation of the racetrack for motorcar races was a public nuisance. The

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<sup>876</sup> Note *Gleason v Hillcrest Golf Course Inc* 148 Misc 246, 265 NYS 886 (1933); *Castle v St Augustine's Links Ltd* (1922) 38 TLR 615; and *Challen v McLeod Country Golf Club* [2004] QCA 358 at para [39] (Mullins J).

<sup>877</sup> 96 Misc 2d 350, 409 NYS 2d 40 (1978) at p 357 of the former report.

Supreme Court affirmed the trial court's finding that there was a definite danger of safety in the vicinity of the raceway from launched projectiles. Undisputed testimony was had at trial that at one time a racing tire flew across the street and hit a witness' garage, and that on other occasions steel guide rails had fallen apart upon impact from the autos and had been projected as far as the public street.

*In Aldridge v Van Patter*,<sup>878</sup> the plaintiffs sued variously in nuisance, negligence and under the rule in *Rylands v Fletcher*. A stock car, racing in a car race on a track adjacent to a public park, crashed through a frail fence surrounding the track and injured the plaintiffs who were walking in the park. The plaintiffs were walking in the park and proceeding to the entrance to the track to buy tickets to enter and witness the sporting event. The Ontario High Court held, inter alia, that the plaintiffs were entitled to found a claim in nuisance, notwithstanding that there was but the single instance of crashing of a racing car into the public park. Liability under nuisance did not rest on the driver but it did rest on the licensee of the track and also on the licensor. *Castle v St Augustine's Links Ltd*, and *Dollman v Hillman Ltd*, were applied and *Stone v Bolton* was not followed. Justice Spence stated: "The evidence in the present case shows conclusively that the defendant the Western Fair Association through its officers, particularly Jackson, the general manager, and Saunders, the grounds superintendent, and also the defendant Martin, knew that there was grave and constant danger of competing drivers going through the fence into this public park and in fact on that very afternoon one competitor already had struck and torn down the fence near which the accident occurred, although by chance the vehicle did not proceed beyond the fence. In the circumstances of this case, I find that *Castle v St Augustine's Links Ltd* and not *Bolton v Stone* applies."<sup>879</sup>

In *Wilkinson v Joyceman*,<sup>880</sup> the owner of the land in question permitted stock car racing to be conducted on it knowing that insufficient precautions had been taken to protect spectators from the serious risk of injury it presented. The Supreme Court of Queensland found him liable for create a nuisance stating that if an occupier of land permits a nuisance to be

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<sup>878</sup> [1952] OR 595, [1952] 4 DLR 93, [1952] OWN 516.

<sup>879</sup> *ibid* at pp 611-612.

<sup>880</sup> [1985] 1 Qd R 567.

conducted on his land, a nuisance which he knows of or ought to know of, he becomes liable for that nuisance and its potentially harmful consequences to others from the time at which he acquired that knowledge or ought to have done so.

## 2. A violent sporting event may be a public nuisance

The sport of boxing may be a public nuisance, and thus a common law crime, on the basis that, because the sport involves punching and hitting a human being in the face and head, boxing may endanger the safety, health or life of the combatants, and by extension of all other professional and amateur boxers and members of the public who desire to emulate the boxers by taking up boxing themselves. The dangerousness of the sport of boxing and the very serious physical injuries that boxers suffer, established through medical science, provides evidence of the degree to which the sport may endanger public health and safety. Whether boxing is a public nuisance is a question of fact. Disparate common law jurisdictions may arrive at different conclusions. In common law jurisdictions where public boxing is legislatively permissible, such as New South Wales and New York, for example, the question as to whether boxing is a public nuisance is moot. In other common law jurisdictions where no statute authorises boxing, such as Queensland and England, for example, the sport of boxing is liable to proscription at common law as a public nuisance. The only means of making lawful that which might be unlawful at common law is for Parliament to enact legislation to change the common law.

The permissibility of conduct within sports is not a private issue for the participants of the sport, but is a public law issue. Defences of consent and *volenti non fit injuria* have no relevant application to the common law crime of public nuisance. Consent and *volenti non fit injuria* do not apply in public nuisance suits because it is not the nature of the actions of the sport which is adjudged criminal by the common law, but, rather, it is the *affect* of the actions of the sport which is adjudged as harming health or life, thus amounting to a public nuisance.

The State has a vested interest in the health of its citizens. This was the dictum from the Supreme Court of Missouri in *State ex rel Attorney-General v Canty*.<sup>881</sup> In *Canty*, the Supreme Court of Missouri enjoined a bullfight staged at the World Exposition in St. Louis in 1904 on the grounds that the proposed public sporting exhibition constituted a public nuisance at common law. The defendants had on divers occasions conducted, and proposed to continue to conduct, a public exhibition of bull-fighting in an arena constructed for that purpose, in St. Louis, near the St. Louis World's Fair Exposition which was at the time in progress. Many thousands of people attended at the bullfights, being each charged an admission fee of fifty cents. Great publicity was given to the performances by advertising in the public press to induce the people to attend. The Attorney General contended that the defendants were maintaining and conducting, and threatening to continue to maintain and conduct, a public nuisance. And he further contended that such nuisance should be abated and enjoined by a court of equity, because the nuisance is an offence against public order, the common good and public decency and morals. The court enjoined the defendants from operating the bullfights. It is worth noting the full description of the sport provided in the judgment of Justice Woodson, which led to the decision to issue an injunction. Of particular merit is Justice Woodson's dictum on how these bullfights endanger public safety, health and life:

“According to the evidence in this case there can be no doubt but that the bull-fights, in so far as the bulls were concerned, were genuine fights and partook of the ferocity and brutality which has ever characterized them in Spain and Mexico. Two matadors were knocked down and injured more or less by the bulls the first night, and might have been seriously injured or killed had it not been for the timely arrival and assistance of their associates; and two others were knocked down, one of them a crazy man, but both escaped injury, through the assistance of their fellows.

While it is true the evidence discloses that the matadors did not use the sword, as is the practice in Spain and Mexico in such fights, nor inflict injury or death upon the bulls, yet that very fact made it more hazardous

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<sup>881</sup> 207 Mo 439 (1907).

and dangerous for the matadors. If they had been furnished with swords they would have been more able to have stopped the mad career of the infuriated bull, and thereby escaped the deadly charge of the Socorro brute, without relying exclusively upon the timely arrival and prompt assistance of their fellow matadors, or the convenient 'escapes' erected along the wall of the arena.

The managers in disarming those poor bull-fighters and placing them in the arena with those mad bulls were almost if not quite as guilty of as great a crime as the Romans were in ancient times, who threw the criminals and Christians into the public arena with the wild beasts to be torn to pieces and killed by them for the edifice and amusement of the morbid and vicious populace...

The State is deeply interested in the lives and well being of all her citizens, and of those who come within her borders, and much more so than she is in the lives and safety of the bulls. The immunity of the bull from punishment under the system of fighting as shown by the evidence in this case in no manner or degree lessened the interest of the State in the lives and limbs of the men who were engaged in those highly dangerous combats and struggles. But in the case at bar one of the steers injured and broke one of his horns, which hung down over his face, and in that condition, with blood flowing therefrom, he would charge and recharge the men and dummy horses, and strike the broken horn against the dummy or the 'escapes' and thereby caused the flow of the blood to increase, which must have been very painful and no less cruel to the dumb brute."

If there is a cognizable public right to protect, such as the public right to safety, health or life, a court has power to enjoin an act as a public nuisance. The court in *Canty* found that the bullfights injured the public right to safety. One key impacting upon the determination as to whether the public right to safety or the public right to health or life has been impinged



upon by the violent sport is whether there exists a class of persons capable of satisfying the definition of “public” under the public nuisance offence. Clearly the court in *Canty* was satisfied that the bullfights affected the public. We know from the discussion early in this thesis that: “[The] number of persons affected need not be shown to be ‘very great’... [only that the public nuisance is] not unreasonably classified as a wrong to the community.”<sup>882</sup> It is sufficient, as a matter of law if the nuisance affects only seven families,<sup>883</sup> or sixteen households,<sup>884</sup> or thirty households.<sup>885</sup> Persons who participate as bullfighters, boxers, or as athletes in other violent sports, may well comprise a cognisable ‘neighbourhood’ or “class of Her Majesty’s subjects” whose public rights to safety, health or life are endangered by their participation in the violent sporting event. And even if a court finds that the participants in the violent sport themselves do not comprise a class against whom a public nuisance is committed, a court may nonetheless find that it is those members of the public who desire to emulate these violent sportsmen who comprise a class whose public rights warrant protecting. The question is one of fact which a tribunal of fact would be required to determine.

An early case in which pugilism was litigated was the case of *Hunt v Bell* in 1822. In this case the plaintiff, a promoter of boxing, sued for libel. The defendant contended that public exhibitions of sparing matches are illegal and that a party who pursues such illegal activity has no remedy by action for a libel regarding his conduct in such vocation. On the facts, the plaintiff was the proprietor of a building called the Tennis-court and exhibited boxing matches “for the amusement of any persons desirous of being spectators thereof, and paying for their admission into such building a certain sum of money per head.”<sup>886</sup> Four justices comprised the bench hearing an appeal from the plaintiff who moved for a new trial. The Justices unanimously dismissed the motion; yet the question as to the lawfulness or unlawfulness of boxing proved vexing for them. Dallas CJ stated:

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<sup>882</sup> *State of New York v Waterloo Stock Car Raceway Inc* 96 Misc 2 d 350 (1978) at p 356 (Conway J)

<sup>883</sup> *Attorney General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (British Columbia Supreme Court).

<sup>884</sup> *Bathurst City Council v Saban (No 2)* (1986) 58 LGRA 201 (Supreme Court of New South Wales, Equity Division, 13 March 1986) BC8601183 at 5.

<sup>885</sup> *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169, [1957] 1 All ER 894.

<sup>886</sup> (1822) 1 Bing 1 at p 3.

“...[I]n the early periods of their history, it has been the practice of all civilized nations to train up their population to exercises of activity and courage; and, with a view to national defence, to promote emulation in amicable contests of strength. I stated to the jury the difficulty of distinguishing between fencing and boxing. Many persons, now present, can recollect the exhibitions of skill by Angelo, Roland, St George, and others; and yet, is not fencing the art of attack as well as of defence, and is it not more dangerous than boxing? But is fencing illegal? Or is it illegal to attend a fencing school? Is it illegal to practice the bow and arrow? Are archery meetings illegal? On all these views of the subject, I felt considerable difficulty. But, on the whole, when I consider that these sparring exhibitions are conducted by professors of pugilism; that they are meetings which may tend to encourage and illegal vocation, and to form prize-fighters, I see no reason for disturbing the present verdict.”<sup>887</sup>

Burrough J viewed public exhibitions of boxing as unlawful because such exhibitions endangered life. His Honour stated: “I am of the opinion, that the practice in question is illegal. The chief object for which persons attend these exhibitions is to see and judge of the comparative strength and skill of parties, who may be afterwards matched as prize-fighters, and that, frequently, to the loss of life; for there can be no doubt that the skill acquired in these schools enables the combatants to destroy life, in some instances, by a single blow...”<sup>888</sup> Justice Richardson took yet another view, opining that public exhibitions of boxing as unlawful because they were a public activity, as opposed to a private pursuit. His Honour drew a distinction between the exercise of boxing as a private recreative activity and public exhibitions of boxing contests: “If the question were merely, whether it is lawful or unlawful for persons to learn the art of self-defence, whether with artificial weapons or such only as nature affords, there can be no doubt that the pursuit of such an object is lawful; but

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<sup>887</sup> (1822) 1 Bing 1 at p 4.

<sup>888</sup> (1822) 1 Bing 1 at p 5.

*public* prize-fighting is unlawful and any thing which tends to train up persons for such a practice, or to promote the pursuit of it, must also be unlawful.’<sup>889</sup>

Sometimes the role of the Executive of Government, as *parens patriae*, through the Attorney General, is to act on behalf of the public to protect the people from themselves. On other occasions the Executive intervenes to protect the public from charlatanism and barbarism. What of the public boxing matches where members of the public, untrained in the sport of boxing, enter into a contest in the ring and are badly injured or killed? Is such a sport a public nuisance? Should such a sport be abated as a public nuisance? Recently, in the United States a boxing promoter named Art Dore has been conducting ‘Toughman’ public boxing contest for amateur boxers and members of the public through a sports association enterprise he established. In June 2003, a 30-year-old mother of two, weighing 110 kilograms and having no boxing experience at all, died two days after contesting a three-round amateur boxing match at a public arena in Sarasota, Florida.<sup>890</sup> The contest was reportedly captured on video camera. Ms. Young, the mother of two, was persuaded to enter into the boxing contest because another woman who wanted to box did not have an opponent. During the match she received repeated blows to the head. It was reported that Ms. Young turned from her opponent several times during the bout and tried to walk away. The referee did not stop the fight. The promoter of the ‘Toughman’ competitions, Art Dore, was present at this contest and acted as the announcer at the match. At one point he is reported to have said of the contest that it was ‘a real cat fight’. Ms. Young had never been in a fight before and was so exhausted by the third round that she could no longer raise her arms in defence. There were shouts from the crowd for the fight to stop. Ms. Young was knocked unconscious and suffered massive brain haemorrhaging, while her family, including her young daughters, watched. It was reported that she was at least the tenth person to die in one of these ‘Toughman’ bouts since they started 24 years previously.<sup>891</sup> The ‘Toughman’ contests operated outside the regulatory and legislative framework governing

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<sup>889</sup> (1822) 1 Bing 1 at p 5.

<sup>890</sup> See — ‘Boxer was hit as she returned to corner: Caught on videotape. Florida mother is fourth person to die in Toughman bouts in last nine months’ *Montreal Gazette* (Montreal Canada 26 June 2003) at p A19; Editorial, ‘Toughman Tragedy’ *St Petersburg Times* (Florida USA 27 June 2003) at p 18A; T Zucco ‘Ringside at Fatal Toughman Bout’ *St Petersburg Times* (Florida USA 25 June 2003) at p 1A; Editorial ‘Not a Tough Call’ *The Palm Beach Post* (Palm Beach Florida USA 26 June 2003) at p 20A.

<sup>891</sup> *ibid.*

the sport of boxing in many United States jurisdictions. As a result of this fact, most of the protections and regulations that are in place for professional boxing matches – such as that commanded by New York’s boxing statute,<sup>892</sup> for example – were missing in the Toughman series. Competitors were not required to be trained and did not have to pass any physical examination. Referees often were unlicensed and were slow to stop one-sided fights. The ‘Toughman’ contests were able to circumvent the legislative agenda in the State of Florida because they offered prizes of less than \$50.<sup>893</sup>

This type of publicly exhibited sport is appalling. There is, quite simply, no other way to describe it. That a man is permitted to profit from the maiming and death of a mother of two children is an affront not only to the communal ethic, but also, to the common law. This ‘Toughman’ series of contests is indubitably a public nuisance, following the definition of public nuisance in sections 823.01 and 823.05 of the Florida Statutes,<sup>894</sup> as well as that provided at common law in *Archbold* or *Wood*, for example. The conduct of these public boxing matches endangers the life, health, and morals, of the public. The absence of strict rules requiring competitors to be properly trained in boxing; the absence of appropriate and qualified medical assistance at the contests; and the absence of properly qualified and trained referees; all evidence endangerment of the health of those who might enter the boxing ring to compete. The events are indiscriminate in their effect, and it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it.<sup>895</sup> These boxing contests are morally culpable. The ‘Toughman’ event attracts, in the words of the Court of Appeal of Kentucky in *Commonwealth v McGovern*, “men of idle, vicious and criminal

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<sup>892</sup> See NY Reg Boxing Sparring and Wrestling c 912 of 1920; *American Boxing and Athletic Association v New York State Athletic Commission* 13 AD 3d 842, 787 NYS 2d 413, Supreme Court of New York Appellate Division (2004)

<sup>893</sup> See — ‘Boxer was hit as she returned to corner: Caught on videotape. Florida mother is fourth person to die in Toughman bouts in last nine months’ *Montreal Gazette* (Montreal Canada 26 June 2003) at p A19; Editorial, ‘Toughman Tragedy’ *St Petersburg Times* (Florida USA 27 June 2003) at p 18A; T Zucco ‘Ringside at Fatal Toughman Bout’ *St Petersburg Times* (Florida USA 25 June 2003) at p 1A; Editorial ‘Not a Tough Call’ *The Palm Beach Post* (Palm Beach Florida USA 26 June 2003) at p 20A.

<sup>894</sup> Fla Stat § 823.01 provides: “All nuisances that tend to annoy the community, injure the health of the citizens in general, or corrupt the public morals are misdemeanors...” Fla Stat § 823.05 provides: “Places declared a nuisance; may be abated and enjoined -- Whoever shall erect, establish, continue, or maintain, own or lease any building, booth, tent or place which tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people as described in s. 823.01,... shall be deemed guilty of maintaining a nuisance, and the building, erection, place, tent or booth and the furniture, fixtures and contents are declared a nuisance. All such places or persons shall be abated or enjoined as provided in ss. 60.05 and 60.06.”

<sup>895</sup> [1957] 2 QB 169 at pp 190-191, [1957] 1 All ER 894 at p 908 (Denning LJ).

habits and practices, whose business is to prey upon the public in some form or other...”<sup>896</sup>

That these contests attract violent, aggressive, and avaricious members of society is cognisable. That such contests also attract the naïve, such as the wife and mother of two children, Ms. Young, who are coaxed to partake of the contest, is also apparent. In this process, the noble and peaceable qualities of community life are harmed. Innocent members of the community are goaded into partaking of violent behaviour. In the depraved environment of the ‘Toughman’ public boxing ring, honour yields to ignominy, decorum yields to malice, and life yields to death. Violence, ferocity, cruelty, and bloodshed – particularly haemorrhages – is pervasive in such an immorally infected environment. The innocent and trusting become fallen. No one, but perhaps an expertly trained athlete cognisant of the great harm which he might inflict on his own health through training and competition, whether amateur or professional, ought to be allowed to be coaxed or persuaded, let alone permitted, to enter into a sporting contest in a public arena.

Public rights were ignored by the Attorney-General of Florida. The Attorney-General of Florida ought to have instituted *ex officio* proceedings to abate any further of the ‘Toughman’ public boxing contests. He ought to have utilised the immediate and swift procedure in equity for abatement of a public nuisance. But this did not take place. A lone parliamentary representative of the Florida legislature assumed responsibility for obtaining redress for vicious events alike the ‘Toughman’ public boxing contest. This representative of the Florida legislature, Donna Clarke, is reported to have said in reference to the ‘Toughman’ contests: “It’s disturbing to me that as much as we work on the laws in this state that we would allow someone to die for entertainment.”<sup>897</sup> She introduced legislation to close loopholes that allowed boxing competitions alike the ‘Toughman’ boxing matches to be staged without having referees and ringside doctors who meet the standards required in regulated amateur boxing matches.

The Florida State legislature passed the *Stacy Young Act, c. 2004-69* in 2004, which amended the provisions in chapter 548 of the Florida Statutes on Pugilistic Exhibitions. The Act

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<sup>896</sup> 116 Ky 212 (1903) at p 237.

<sup>897</sup> C Sherman ‘Regulations Urged for Amateur Boxing – Polk County will Listen to a Plea from the Relative of a 30-year-old Mother who Died from Fatal Blows’ *Orlando Sentinel* (Orlando Florida USA 29 July 2003) at p B2.

provides, amongst other amendments, that no amateur boxing or kickboxing match may be held in Florida unless it is sanctioned and supervised by an amateur sanctioning organization approved by the Florida Boxing Commission.<sup>898</sup> The Act provides, further, that any person holding, promoting, or sponsoring a match prohibited under the section commits a third degree felony;<sup>899</sup> that any person participating in a match prohibited under the section may be charged with a second degree misdemeanour;<sup>900</sup> and that no amateur mixed martial arts match may be held in Florida.<sup>901</sup> In other states, more stringent regulation effectively prevented the staging of the ‘Toughman’ boxing matches. The New York State Athletic Commission was granted a permanent injunction prohibiting the American Boxing and Athletic Association from holding its ‘Toughman’ contests in New York: *American Boxing and Athletic Association v New York State Athletic Commission*.<sup>902</sup> The court held that the Commission was vested with the sole direction, management, control, and jurisdiction over all boxing matches or exhibitions conducted within the State of New York pursuant to New York State Unconsolidated Law, c. 7, s. 6; and thereby could obtain an injunction preventing the staging of any boxing match not approved by the Commission.<sup>903</sup> Yet, as is evidenced by the facts surrounding the death of Ms. Young in June 2003, even where there exists legislative regulation of the sport of boxing, there remains a pertinent role for the Executive arm of Government to ensure that events inimical to the people, such as the ‘Toughman’ boxing contests, do not take place. The role of the Executive in endeavouring to prevent the occurrence of events inimical to the people is apparent particularly in states where there is no legislative regulation of boxing.<sup>904</sup> The Executive ought to act consciously and swiftly, as *parens patriae*, to protect the life, health, and moral welfare of its subjects. The people of Florida had to wait close to a year before the law was changed legislatively to outlaw the ‘Toughman’ boxing contest, and alike boxing and kickboxing contests, during which time other similar boxing matches were staged.<sup>905</sup> The people of Florida had to wait because the

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<sup>898</sup> The Act created Fla Stat § 548.065.

<sup>899</sup> The Act amended Fla Stat § 548.008, the relevant provision is at Fla Stat § 548.008(4)(b).

<sup>900</sup> *ibid*, the relevant provision is at Fla Stat § 548.008(4)(a).

<sup>901</sup> *ibid*, the relevant provision is at Fla Stat § 548.008(2).

<sup>902</sup> 13 AD 3d 842, 787 NYS 2d 413, Supreme Court of New York Appellate Division (2004).

<sup>903</sup> See also *Ohio Boxing Commission v Adore Ltd* 110 Ohio App 3d 288, 673 NE 2d 1016 (1996); *Ohio Boxing Commission v Dore* 1996 Ohio App LEXIS 2504.

<sup>904</sup> States where the sport of boxing is not regulated by statute include, eg, United Kingdom and Queensland.

<sup>905</sup> JA Zeitlin ‘Toughman Competition Returns to action at TECO’ *Naples Daily News* (Naples Florida USA 27 September 2003) <<http://www.bonitanews.com/03/09/naples/e16049a.htm>> (11 May 2005).

Executive of Government took no action. Perhaps the Executive was unaware of its powers and its duties.

The use of an *ex officio* suit by the Attorney-General for abatement of a public nuisance would have provided, in the circumstances surrounding the ‘Toughman’ boxing matches in Florida, for example, a more immediate remedy pending the passage of legislation to outlaw the sport. In this way, the Executive and the Legislature would work concomitantly for the people to ensure that the safety and moral welfare of the people is protected at all times. The use of injunctive relief for abatement of a public nuisance pending the trial and conviction of the perpetrator of the public nuisance was the usual procedure when the injunctive remedy was first established in Chancery: *Attorney-General v Johnson*.<sup>906</sup> The Executive can move more quickly than the Legislature, and the Executive ought to be cognisant of this fact. Utilising the common law to abate a public nuisance does not mean that the Executive Government is working against the legislative agenda of Parliament. The Executive does not exercise its powers in defiance of Parliament. The common law is not the enemy of statute. Rather, in the use to which the common law offence of public nuisance can be put, the Executive can work to obtain an immediate, even if temporary, remedy, pending full and appropriate inquiry by Parliament of changes to statute laws. In such circumstances, the people do not have to anticipate the death of any other wife and mother of two children to obtain a remedy. The people can be secure in the knowledge that their public rights are not being derided by the unprincipled and debauched.

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<sup>906</sup> (1819) 2 Wils Ch 87, 37 ER 240. The use of civil proceedings for injunctive relief was undertaken as a supplement to criminal proceedings, rather than as a substitute for them. In one of the earliest cases involving public nuisance where the Crown’s right to sue in Chancery for injunctive relief was established, *Attorney-General v Johnson* (1819) 2 Wils Ch 87, 37 ER 240, a prosecution had already been launched to stop the defendant from unlawfully obstructing the Thames by building a wharf. The defendant continued to build despite the institution of criminal proceedings against him and the Crown feared that the obstruction of the Thames would be complete in defiance of conviction. The Attorney-General went to Chancery for immediate relief. Lord Chancellor Eldon granted a temporary injunction until the trial. See also *Attorney-General v Cleaver* (1811) 18 Ves 212, 34 ER 297; and *Crowder v Tinkler* (1816) 19 Ves 618, 34 ER 645.

### 3. Publicly exhibited sporting events endangering public safety, health or life, indirectly

There are other factual scenarios associated with public sporting events for which the common law offence of public nuisance is applicable. Football, tennis, cricket, or baseball tournaments, or other contests, which bring together riotous or violent persons may create a public nuisance where the riotous or violent crowd endangers the safety, health or life of the spectators in the crowd or of the residents or communities living in the locale where the tournament is staged. There are countless media reports of occurrences where melees have broken out amongst fans at football matches, at tennis matches, and at cricket and baseball games, for example. A good record of a violent crowd at a football match can be found in *Cunningham v Reading Football Club Ltd*,<sup>907</sup> where is described fighting amongst spectators, spectators breaking up concrete and using pieces of concrete as missiles, the throwing of missiles such as sharpened coins and concrete onto the pitch and into adjoining grandstands. The entity responsible for such acts endangering public safety, public health or the life of the public is the sports event promoter or sports event organizer and not only the individual members of the rioting or violent crowd.<sup>908</sup> Whether a particular match creates a public nuisance by endangering public safety, health, or the life of the public is a question of fact.

In a football stadium, or at a tennis championship, the peaceable spectators attending a public sporting event to witness the competition being staged would most certainly comprise the “public” for the purposes of a public nuisance suit should these peaceable spectators being caught in the middle of violent or riotous behaviour from other spectators. In number they would need to comprise only seven or thirty families to constitute a class whose rights to safety or life are endangered by a violent or riotous crowd.<sup>909</sup>

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<sup>907</sup> The Times 22 March 1991.

<sup>908</sup> Note the holdings in *R v Shorrock* [1994] QB 279 (Court of Appeal) at p 289 (Justice Rattee) approved by the House of Lords in *R v Rimmington*, *R v Goldstein* [2005] UKHL 63 at para [21] and [39] (Lord Bingham of Cornhill) and para [56] (Lord Roger of Earlsferry), [2006] 1 AC 459, [2005] 3 WLR 982; *Wilkinson v Joyceman* [1985] 1 Qd R 567; *Attorney-General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (BCSC); *Attorney-General v Blackpool Corporation* (1907) 71 JP 478; and *Commonwealth v McGovern* 116 Ky 212 (1903) at p 238 (Settle J).

<sup>909</sup> Note the holdings in *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169, [1957] 1 All ER 894; *Attorney-General of British Columbia v Haney Speedways Ltd* [1963] 39 DLR (2d) 48 (British Columbia Supreme Court); *State*



Where a publicly exhibited sporting event may be found to have committed a public nuisance by endangering public safety, public health or the life of the public owing to crowds of violent or riotous fans, an injunction might command that a subsequent competition be cancelled or that a subsequent competition be held without attendant crowds. An injunction might even go as far as disallowing two teams from ever competing against one another within an organised sporting tournament.

#### 4. Doping in sport may be a public nuisance

Sports organizations that conduct publicly exhibited sporting events and fail to implement comprehensive and safe anti-doping procedures may create a public nuisance by endangering public safety, public health or the life of the public. The common law offence of public nuisance may also have pertinent application to sports organisations that fail to maintain a strict anti-doping policy. In jurisdictions where a uniform code or legislation has been adopted, such as in Australia, the need for the involvement of the Attorney-General in protecting public rights against sports organisations failing to implement a comprehensive and safe anti-doping policy is obviated. In Australia, for example, section 9 of the Australian Sports Anti-Doping Authority Act 2006 (Cth) and regulation 3 of the Australian Anti-Doping Authority Regulation 2006 (Cth) establish a National Anti-Doping Scheme which requires all Australian athletes competing in sporting events to comply with anti-doping rules.<sup>910</sup> In the absence of legislation requiring strict and uniform drug testing in sport, for all

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*of New York v Waterloo Stock Car Raceway Inc* 96 Misc 2 d 350 (1978) at p 356 (Conway J); *Bathurst City Council v Saban (No 2)* (1986) 58 LGRA 201 (Supreme Court of New South Wales, Equity Division, 13 March 1986) BC8601183 at 5.

<sup>910</sup> The class of athletes covered by the National Anti-Doping Scheme and doping testing procedures is exhaustive and effectively comprises of all athletes competing in sport competitions in Australia and includes the class of athletes listed at cl 1.06 of Schedule 1 of the Australian Anti-Doping Authority Regulation 2006 (Cth) as follows:

“1.06 Classes of athletes subject to the NAD scheme

- (1) The anti-doping rules apply to all persons who are involved as athletes in a sport with an anti-doping policy and such persons are subject to the NAD scheme.
- (2) The following classes of athletes may be tested by ASADA under the NAD scheme:
  - (a) athletes in ASADA's registered testing pool;
  - (b) athletes in ASADA's domestic testing pool;
  - (c) international-level athletes;

sports, including non-Olympic sports leagues, however, the Executive Government could seek compliance with a uniform policy through the use of common law public nuisance suits. Non-Olympic sports leagues may have different or divergent anti-doping policies to national sports federations or international sports federations and some governing sports bodies may appear to be more lenient on anti-doping policy implementation than others depending on the nature and extent of any penalty applying to doping within their sport or sports league. The health risks or health dangers posed by the use of even lawfully obtained drugs by athletes in sport competition is real. Medical science continues to investigate the health dangers, including long-term health dangers, of the use of lawful drugs in extreme and professional sporting contexts. The use of any drug, whether legal, illegal or performance enhancing, in extreme and professional sporting contexts may be a public nuisance where there is medical evidence to support the argument that such use poses a health risk not only to the players themselves but to members of the public at large who seek to emulate the success of these athletes.

On the issue of public health, a lenient or acquiescent drugs policy may be said to impliedly encourage drug use not only amongst athletes in a sport, but also amongst aspiring participants in the sport and members of the public who emulate the athletes.<sup>911</sup> Particularly vulnerable are young men and young women, and children in school, who are desirous of emulating sporting prowess. A lenient or non-existent anti-doping policy implies that

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- (d) athletes who compete in international events;
  - (e) athletes who compete in national events;
  - (f) athletes for whom ASADA is required or permitted to test under a contract or an anti-doping arrangement; and
  - (g) athletes in the registered testing pool of an International Sporting Federation or national anti-doping organisation.”

<sup>911</sup> The use of drugs in sport is a public health issue. This view is supported by the Committee on Government Reform and the Committee on Energy and Commerce of the House of Representatives, United States Congress. Indeed, members of both committees hold the view that the United States Congress has a responsibility to protect the public from these dangerous, performance enhancing substances. See, The Committee on Energy and Commerce, United States House of Representatives, ‘Anti-Steroid Bill Wins Subcommittee Approval’ <[http://energycommerce.house.gov/108/News/05252005\\_1538.htm](http://energycommerce.house.gov/108/News/05252005_1538.htm)> (27 May 2005); Committee on Government Reform, United States House of Representatives, ‘Government Reform Committee Approves Anti-Steroid Clean Sports Act 2005’ (Washington, 26 May 2005) <<http://reform.house.gov/GovReform/News/DocumentSingle.aspx?DocumentID=28038>> (27 May 2005); and Committee on Government Reform, United States House of Representatives, ‘McCain, Davis and Waxman Announce Introduction of Clean Sports Act of 2005; Legislation Sets Uniform Testing Standards and Stringent Penalties for Performance-Enhancing Drugs’ (Washington, 24 May 2005) <<http://reform.house.gov/GovReform/News/DocumentSingle.aspx?DocumentID=28021>> (27 May 2005).

aspiring athletes have little chance of being competitive or of succeeding in their chosen sport absent the use of performance enhancing drugs. Thus, the policy of a sports federation which does not actively seek to prohibit all drugs in sport or to enforce doping bans in sports activity may be viewed as creating endangerment to public health. A public nuisance may be caused by an act *or* an omission on the part of a sports federation. This endangerment is indiscriminate in its operation because the potential scope of a permissive or acquiescent drug testing policy, and the resultant health problems for a multitude of people who might aspire to participate in the sport, is vast. A court ought to have little problem in finding there to be a sufficient cross-section of the public whose public right to health is endangered by a lenient or acquiescent drugs policy.

In the United States, the disparate sports of baseball, basketball, gridiron and hockey maintain different policies on doping in their individual sport.<sup>912</sup> A 2005 Congressional Research Service report found that the anti-doping policies for the Olympic movement are more independent of the sports they regulate than are the policies of Major League Baseball, the NBA, and the NFL, both in the mode in which they are established and in the entities responsible for their implementation. For example, the World Anti-Doping Agency (WADA) autonomously established the anti-doping policy for Olympic athletes, whereas the professional sports leagues' policies are the result of negotiations with their respective players associations.<sup>913</sup> Further, the Olympic movement also maintains the most comprehensive list of prohibited substances and methods, and provides sanctions that are more severe than in the professional sports. The Olympic standard provides a two-year ban for a first violation, whereas Major League Baseball imposes a 10-day suspension without pay for a first violation. Also, Olympic athletes and NFL players are responsible for what is in their bodies, but neither Major League Baseball nor the NBA addresses this subject.<sup>914</sup> Members of the United States Congress attempted to create a uniform anti-doping policy for United States sports in 2005, introducing bills including the Clean Sports Bill and Drug Free

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<sup>912</sup> See R Sandomir 'Congress Keeps Pressure on Leagues' *New York Times* (New York, United States of America, 19 May 2005) at p 2.

<sup>913</sup> LE Halchin 'Anti-Doping Policies: The Olympics and Selected Professional Sports' (Congressional Research Service The Library of Congress Washington 29 April 2005)

<<https://www.policyarchive.org/handle/10207/2423>>

<[https://www.policyarchive.org/bitstream/handle/10207/2423/RL32894\\_20050429.pdf?sequence=1](https://www.policyarchive.org/bitstream/handle/10207/2423/RL32894_20050429.pdf?sequence=1)> (15 March 2009).

<sup>914</sup> *ibid.*

Sports Bill that would set uniform minimum drug-testing rules and penalties for the four major United States professional sports.<sup>915</sup> Each of these bills never became law, having died at the Committee stage of the congressional legislative process.<sup>916</sup> In lieu of a legislative agenda, the Executive Government could develop a strict uniform policy concerning doping in sport and require compliance from sports federations through threat of injunctive relief for a public nuisance.

The Executive Government has a crucial role to play in sports because, as *parens patriae*, the Executive exists to protect, inter alia, public safety and public health. The Executive does not make law, but rather enforces the law. The law which the Executive enforces through proceedings for a public nuisance is the common law; there being no legislative provision protecting the public right to safety and the public right to health in respect of doping in sport. The formulation of policy consistent with the common law, and seeking compliance with such policy and law, are functions of the Executive Government. Failure to accede to the Executive Government's policy may result in civil suit for a public nuisance. Any injunctions granted might disallow public competitions being staged in a sport until such time as the sport's governing body amended their rules to reflect the WADA anti-doping standards.

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<sup>915</sup> As of May 2005, two proposed bills, one entitled Clean Sports Act 2005, the other entitled Drug Free Sports Act 2005, are in Committee hearings in the United States Congress. Both bills propose a uniform standard for drug testing and uniform penalties for first, second and third time offences. Based on the Olympic model, the Clean Sports Act would set drug-testing policy for the NFL, NBA, NHL and Major League Baseball. It calls for a two-year ban for a first offence, a lifetime ban for a second, and mandates five tests per athlete each year. The Drug Free Sports Act calls for the same penalties as the Clean Sports Act, but it requires only two tests each year. The bill would give the secretary of commerce authority over sports' drug-testing policies; whereas the Clean Sports Act gives oversight to the White House drug tsar. See s 1114 'Clean Sports Act of 2005 'A Bill To Establish Minimum Drug Testing Standards for Major Professional Sports Leagues', 109<sup>th</sup> Congress, 1<sup>st</sup> Session, Government Printing Office, United States Congress, , <[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:s1114is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s1114is.txt.pdf)> (27 May 2005).

<sup>916</sup> See <<http://www.govtrack.us/congress/bill.xpd?bill=s109-1114>> (20 August 2008); <<http://www.govtrack.us/congress/bill.xpd?bill=h109-1862>> (20 August 2008); <<http://www.govtrack.us/congress/bill.xpd?bill=s109-1114&tab=related>> (20 August 2008).

## 5. Concluding remarks

A sporting event may endanger public safety, public health or the life of the public either directly, such as where equipment used in a sport becomes a projectile injuring members of the public, or indirectly, such as where the event draws crowds of violent persons injuring the safety of peaceable spectators. Further, public exhibitions of violent sports such as boxing may be public nuisances because they create a standard of behaviour which is unsafe and physically harmful not only to those persons who participate in the sport but to those members of the public, often children and young adults, who emulate violent athletes. Finally, an organised publicly exhibited sporting competition may create a public nuisance because the sport's governing body fails to implement an appropriate anti-doping deterrence policy. In this last situation, a public nuisance is created because the safety, health and life of athletes participating in the sport, as well as the safety, health and life of those members of the public, particularly children and young adults, who emulate those athletes, is endangered.

The development of the law in public nuisance litigation is comprehensive. Yet the question as to whether public rights are adequately protected by such litigation remains relevant.

Whilst it may appear from the analysis of the development of the law in public nuisance suits that the law has happily dealt with the myriad issues which arise in public sport activity, and particularly given the growth of such activities within the public domain, consideration as to the need for legislative interference is warranted because the fact remains that it is unlawful at common law for the Executive to participate in or to acquiesce in the promotion of public sport activity where such activity impinges upon public rights. The Executive is, effectively, complicit in the commission of a common law criminal offence in such circumstances.

Consideration of the need for a new legislative regime is further warranted because of evidence of reluctance on the part of the Executive to prosecute offences in sport,<sup>917</sup> and

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<sup>917</sup> See R Horrow *Sports Violence: The Interaction Between Private Lawmaking and the Criminal Law* (Carrollton Press Arlington Virginia 1980) at pp 110-160 for a comprehensive discussion concerning the several factors that have an effect on a prosecutor's decision to adjudicate professional sport violence. Horrow examines the results of his own 1978 survey of 34 prosecutors, who were solicited about the relative legal inaction against athletes. Many prosecutors feel that prosecuting professional athletes for actions taken during competition would not have a deterrent effect, as most athletes would not view their actions as criminal: see also JH Katz 'From the Penalty Box to the Penitentiary – The People Versus Jesse Boulerice' (2000) 31 Rutgers LJ 833 at pp 853-854; BC Nielsen 'Controlling Sports Violence: Too Late for Carrots – Bring on the Big Stick' (1989) 74 Iowa L Rev

because of the danger that public rights might be ignored. The discourse on the development of common law public nuisance in cases of sport in this Part 3 of the thesis also highlights that much of the precedent in public nuisance suits where the courts have restrained public sport activity is old, with the most persuasive juridical pronouncements dated from the late nineteenth and early twentieth centuries, and with few contemporary judgments. In Part 4 of the thesis, following, limits on the powers of the Executive and Local Government to promote public exhibitions of sport are discussed. Practically, public rights may dissipate where the Crown fails to bring suit to abate public exhibitions of sport on grounds of public nuisance and, instead, in fact promote public exhibitions of sport.

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681and J Yates and W Gillespie 'The Problem of Sport Violence and the Criminal Prosecution Solution' (2002) 12 Cornell J L & Pub Pol'y 145 at p 148, citing RB Horrow 'Violence in Professional Sports: Is it Part of the Game?' (1982) 9 J Legis 1 at p 1.

## **Part 4    The Role of the Crown in Regulating Sporting Events**

## Chapter 14

### The power of local councils vis-à-vis sports events

#### 1. No authority but Parliament can license or pardon a public nuisance

Neither the Crown, exercising executive sovereignty, nor a local authority, possessing no executive authority and being a mere creature of statute, can license or pardon a public nuisance. This has been a common law principle since at least the seventeenth century. In *Devell v Sanders*,<sup>918</sup> the court referred to *Fowler v Sanders*,<sup>919</sup> as deciding that “none can prescribe to make a common nuisance, for it cannot have a lawful beginning by license or otherwise, being an offence at common law”. Chief Justice Montague is recorded to have stated: “Neither the King nor the lord of the manor can give any liberty to erect a common nuisance.” Chitty lays it down in his treatise *Prerogatives of the Crown*: “It is generally laid down in the books, that the Crown cannot pardon a common nuisance whilst it remains unredressed, and is continuing; so as to prevent abatement of it, or a prosecution against the offender: though his Majesty might afterwards remit the fine. As the continuation of a nuisance is, of itself, a fresh offence in point of law; this doctrine may be supported on the ground that the King cannot... dispense with the laws by any previous license.”<sup>920</sup>

Publicly exhibited sporting events are invariably staged consequent to the obtaining of a license from a local authority who has care and management responsibilities in respect of the public place where the public sporting event is proposed to be staged. This was the case in

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<sup>918</sup> (1619) Cro Jac 490, 79 ER 419.

<sup>919</sup> (1617) Cro Jac 446, 79 ER 382.

<sup>920</sup> J Chitty *Prerogatives of the Crown* (Butterworths London 1820) at p 91, citing 12 Co 30, 2 Hawk b 2 c 37 s 33, 4 Bla Com 398, Ld Raym 370, 713.



the public nuisance sporting cases of *Johnson v City of New York*,<sup>921</sup> *Attorney-General v Blackpool Corporation*,<sup>922</sup> and *State of New York v Waterloo Stock Car Raceway Inc.*<sup>923</sup> A license issued to a sporting association by a local government authority may be viewed as an arbitrary attempt to dispense with the laws by license alone.

Local governments obtain their care and management responsibilities from a grant of power pursuant to a statute from the supreme legislature in the jurisdiction wherein they operate. Local governments are not sovereign. They are a construct of the supreme legislature and are entirely dependent upon the supreme legislature for the source of their authority and jurisdiction. It is highly questionable whether this grant of power to care for and manage public spaces under an Act of Parliament incorporates a power to alter the common law by license and to permit the commission of a common law offence.<sup>924</sup> Local or municipal

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<sup>921</sup> 186 NY 139, 78 NE 715, Court of Appeals of New York (1906).

<sup>922</sup> (1907) 71 JP 478, followed *Attorney General (ex rel Pratt) v Brisbane City Council* (1988) 1 QdR 346 at p 353.

<sup>923</sup> 96 Misc 2d 350 (1978) at p 358, citing *Little Joseph Realty v Town of Babylon* 41 NY 2d 738, Court of Appeals of New York (1977).

<sup>924</sup> Any purported local government power to alter the common law must be found to be clearly expressed in the grant of power from the supreme legislature. Local government powers may, of course, be exercised in a manner consistent with the common law. “It is a well recognized rule in the interpretation of Statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction.” *Sargood Brothers v Commonwealth* [1910] HCA 45, (1910) 11 CLR 258 at p 279 (O’Connor J). The point has frequently been repeated: *Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9, (1983) 45 ALR 609 at p 617; *Melbourne Corporation v Barry* [1922] HCA 56, (1922) 31 CLR 174 at p 206; *Baker v Campbell* [1983] HCA 39, (1983) 153 CLR 52 at p 123; *De Innocentis v Brisbane City Council* [1999] QCA 404 at para [22]. cf *Bone v Mothershaw* [2002] QCA 120 at para [15] where McPherson JA said: “It is well settled that inconsistency between a local law and the general law or common law of Queensland does not result in invalidity of the local law. See *Widgee Shire Council v Bonney* [1907] HCA 11, (1907) 4 CLR 977 at p 982, where Griffith CJ said that the suggestion that a by-law may not add to the law was untenable, ‘for in that view the power to make by-laws would be absolutely nugatory’. In the same case (at pp 986-987), Isaacs J, quoting from a judgment in an earlier English decision, said that a by-law ‘must necessarily superadd something to the common law, otherwise it would be idle’. To deny a local government authority to alter or add to the general or common law would completely stultify the legislative power conferred on it.” With respect to McPherson JA, the Supreme Court of Queensland holding erroneously interprets the ratio decidendi of *Widgee Shire Council*. The cited dicta is taken out of context. The High Court in *Widgee Shire Council* confined their analysis to local laws which were not inconsistent with legislative enactments. Isaacs J, in his judgment in *Widgee Shire Council* cited *Edmonds v The Master and Senior Warden of the Company of Watermen and Lightermen* [24 LJMC 124 at p 128] where it was claimed that a by-law was ‘inconsistent with the laws of this kingdom.’ Lord Campbell LC answered that claim by saying:—“A by-law cannot be said to be inconsistent with the laws of this kingdom merely because it forbids the doing of something which might lawfully have been done before, or requires something to be done which there was no previous obligation to do; otherwise a nominal power of making by-laws would be utterly nugatory.” Isaacs J further cited Martin B in *The Queen v Saddler’s Co* [3 El & E 72 at p 80] who observed that a by-law ‘must necessarily superadd something to the common law, otherwise it would be idle.’” However, Isaacs J did not go so far as to say that a local government by-law by itself will be held to alter the common law. He concluded his analysis by stating: “That a by-law should be contrary to a law in force in Queensland it must be inconsistent with it. No provision of Queensland law has been referred to which this by-law can be said to contravene, either by penalizing an act declared to be lawful or by legalizing what is forbidden.” Further

councils may enact by-laws which provide that a license or written approval must be obtained prior to the staging of a publicly exhibited sporting event.<sup>925</sup> The actions of local governments under such circumstances raise a number of very important legal questions. Does the local government possess power to approve or license actions which may create a public nuisance? What is the nature of local government power respecting the staging of public exhibited sporting events and the licensing of activities which would otherwise be public nuisances? Can a local council change the common law by their license? How is a statute granting power to local government to be construed? Is the local government's approval or license a defence to liability for committing a public nuisance for the promoter or sports organization staging the public sporting event?

The doctrine of parliamentary sovereignty is a common law doctrine which ensures that only the supreme legislative authority has power to alter the common law, and that the Executive and local authorities both lack power to alter the common law unless the supreme legislature has specifically devolved that power to them.

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McPherson's dictum in *Bone v Mothersham*, and that of the High Court of Australia in *Widgee Shire Council*, may be incompatible with the High Court of Australia's holdings in *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304, where O'Connor J said: "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness." Aff'd: *Bropho v Western Australia* [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18; *Coco v The Queen* (1994) 179 CLR 427 at pp 436-437; *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ). See also *Melbourne Corporation v Barry* [1922] HCA 56, (1922) 31 CLR 174 at p 206. In *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ), the court referred to "a well established and conservative principle of interpretation that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law." There is a presumption against a parliamentary intention to infringe upon such rights and freedoms: *R v Secretary of State for the Home Department; Ex parte Pierson* [1997] UKHL 37, [1998] AC 539 at p 587 (Lord Steyn). "Fundamental rights cannot be overridden by general or ambiguous words": *R v Secretary of State for the Home Department; Ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 at p 131 (Lord Hoffmann). See also *Benson v Northern Ireland Road Transport Board* (1942) AC 520 at pp 526-527.

<sup>925</sup> See eg r 24(2) *Sunshine Coast Regional Council (Noosa Shire Council) Local Law No 5 – Parks and Reserves* which provides that: "A person shall not in any park without the written approval of the Council except at places set apart therefor, organize or play a game, the playing of which requires the exclusion from the playing space of all persons other than those engaged in that game." Pursuant to regs 20-21 Local Government Reform Implementation (Transferring Areas) Regulation 2007 (Qld) and regs 12-13 Local Government Reform Implementation Regulation 2008 (Qld) the local laws of the Noosa Shire Council continue to operate until 31 December 2010 upon the amalgamation of Noosa Shire Council with Sunshine Coast Regional Council.

## 2. Parliamentary sovereignty

Parliamentary sovereignty, also referred to as parliamentary supremacy, is the rule that Parliament has “the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament. Parliament is not bound by its predecessor.”<sup>926</sup> Dicey draws distinction between parliamentary sovereignty as “a merely legal conception”, which “means simply the power of law-making unrestricted by any legal limit,” and “‘sovereignty’ sometimes employed in a political rather than in a strictly legal sense.”<sup>927</sup> But the two uses of the word sovereignty are not the same thing. Parliamentary sovereignty is a legal concept, foremost, because: “The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors.”<sup>928</sup> Julius Stone similarly highlighted the fine distinction between “sovereignty as descriptive of power relations”, and the “sovereignty-concept in the logical structuring of law.”<sup>929</sup> The phrase parliamentary sovereignty describes two complementary concepts. Parliamentary sovereignty describes the political supremacy of Parliament. In this sense the doctrine focuses on the relations, particularly the division of power, between the Judiciary, Executive and Legislature and subordinate political bodies such as local governments, and the relations between each of these institutions and the Constitution. Parliamentary sovereignty also describes the nature and effect of law. And in this sense the doctrine focuses on the relations between law created by statute, the common law, local laws, and subordinate rules and regulations.<sup>930</sup>

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<sup>926</sup> AV Dicey *The Law of the Constitution* (8<sup>th</sup> edn MacMillan London 1920), (10<sup>th</sup> edn MacMillan London 1959) at pp 39-40.

<sup>927</sup> AV Dicey *Law of the Constitution* (MacMillan London 1920) at pp 70, 72.

<sup>928</sup> *ibid.*

<sup>929</sup> J Stone *The Legal System and Lawyers' Reasonings* (Maitland Sydney 1964) at p 69ff.

<sup>930</sup> Other lawyers write of a distinction between ‘statutory omnicompetence’ (parliamentary power over all subject matters, including the ‘supremacy’ of Parliament over the King’s prerogative powers) and ‘statutory or legal omnipotence’ (power not only to legislate on all subject matters, but also to legislate free of any legal limitations setting moral or other minimum standards for the content of legislation): MD Walters ‘St German on Reason and Parliamentary Sovereignty’ (2003) 62 Cambridge Law Journal 335 at pp 367-68.

The doctrine of parliamentary sovereignty is a common law doctrine.<sup>931</sup> In *Lange v Australian Broadcasting Corporation*, the High Court of Australia quoted with approval the following observations of Sir Owen Dixon:

“The British conception of the complete supremacy of Parliament developed under the common law; it forms part of the common law and, indeed, it may be considered as deriving its authority from the common law rather than as giving authority to the common law. But, after all, the common law was the common law of England. It was not a law of nations. It developed no general doctrine that all legislatures by their very nature were supreme over the law.”<sup>932</sup>

As descriptive of the power relations between the diffuse organs of government and the relations between legislative enactments and common law, parliamentary sovereignty has been described as a common law rule created by judges which judges can change;<sup>933</sup> as a common law rule of recognition which judges may not change;<sup>934</sup> and as a mixture of

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<sup>931</sup> In *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24, (1996) 189 CLR 51, Dawson J opined at p 76: “The doctrine of parliamentary supremacy is a doctrine as deeply rooted as any in the common law. It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should give unquestioned effect to it accordingly.” Lord Steyn similarly stated in *Jackson v Attorney-General* [2005] UKHL 56 at para [102], [2006] 1 AC 262, [2005] 3 WLR 733: “...[T]he supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law.” See also HWR Wade ‘Sovereignty – Revolution or Evolution?’ (1996) 112 LQR 568; HWR Wade ‘The Basis of Legal Sovereignty’ (1955) 13 CLJ 172 at p 189; J Goldsworthy ‘The Myth of the Common Law Constitution’ in DE Edlin (ed) *Common Law Theory* (Cambridge University Press Cambridge 2007); and J Goldsworthy *The Sovereignty of Parliament* (Clarendon Press Oxford 1999).

<sup>932</sup> [1997] HCA 25, (1997) 189 CLR 520 at pp 562 and 563-64, citing Sir Owen Dixon ‘Sources of Legal Authority’ in *Jesting Pilate* (Law Book Co Sydney 1965) at pp 199-200, followed *Egan v Chadwick & Ors* [1999] NSWCA 176 at para [5] (Spigelman CJ).

<sup>933</sup> Parliamentary sovereignty has been argued to subsist, “in the tranquil development of the common law, with a gradual reordering of our constitutional priorities to bring alive the nascent idea that a democratic legislature cannot be above the law.” (Sir John Laws ‘Illegality and the Problem of Jurisdiction’ in M Supperstone and J Goudie (eds) *Judicial Review* (2nd edn Butterworths London 1997) at 4.17). Lord Steyn in *Jackson v Attorney-General* [2005] UKHL 56 at para [102], [2006] 1 AC 262, [2005] 3 WLR 733, spoke of the doctrine of parliamentary sovereignty as a common law doctrine which is fully within the authority of the judiciary to change: “...[T]he supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.” (at para [102] (Lord Steyn)). Lord Steyn’s comments resonate Trevor Allan’s writing: “the common law is prior to legislative supremacy, which it defines and regulates.” (TRS Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press Oxford 2001) at p 271). cf Professor Goldsworthy, who observes that: “Parliament’s sovereignty was not created by the judges alone, and its continued existence depends only partly, and not solely, on their willingness to accept it.” (J Goldsworthy *The Sovereignty of Parliament* (Clarendon Press Oxford 1999) at p 240).

<sup>934</sup> See *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24, (1996) 189 CLR 51 at pp 73-73 (Dawson J).

political reality and law beyond the power of judges to change unilaterally.<sup>935</sup>

Parliamentary sovereignty is a doctrine which recognizes Parliament's plenary powers to make law, even where a written Constitution and a federal system of government, such as in Australia and Canada, for example, established limits on the supreme legislative authority by subject matter. In *Kartinyeri v Commonwealth*, the High Court of Australia said of the powers of the Federal Parliament that: "The legislative powers conferred on the Parliament by s 51 of the Constitution are plenary powers, that is to say, 'subject to' any prohibition or limitation contained in the Constitution, the Parliament can 'make laws with respect to' the several subject matters contained in s 51 in such terms, with such qualifications and with such limitations as it chooses. The power 'to make laws' is a power as ample as that described by Sir Edward Coke and later adopted by Blackstone: 'Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds.'"<sup>936</sup> In *Singh v Canada*, Strayer JA noted of the Canadian constitutional framework that "both before and after 1982 our system was and is one of parliamentary sovereignty exercisable

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<sup>935</sup> In *Durham Holdings Pty Ltd v New South Wales* [2001] HCA 7 at para [62], (2001) 205 CLR 399, Kirby J noted that, in Australia at least, the common law operates within an orbit of written constitutional laws and political realities. Professor Goldsworthy argues that the doctrine of parliamentary supremacy itself is not properly regarded as either a matter of statute law or a matter of common law. Parliament did not enact a law that it should be supreme, nor is the doctrine judge-made law like a contemporary rule of precedent. (JD Goldsworthy *The Sovereignty of Parliament* (Clarendon Press Oxford 1999) at pp 243-4). Goldsworthy quotes with approval GC Winterton's statement that the doctrine of parliamentary sovereignty is '*sui generis*, a unique blend of law and political fact deriving its authority from acceptance by the people and by the principal institutions of the state, especially parliament and the judiciary. (See G Winterton 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in C Sampford and K Preston (eds) *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press 1996) at p 136). Goldsworthy further argues that: "for many centuries there has been a sufficient consensus among all three branches of government in Britain to make the sovereignty of Parliament a rule of recognition in HLA Hart's sense, which the judges by themselves did not create and cannot unilaterally change. Judicial repudiation of that doctrine would amount to an attempt unilaterally to alter that political fact. This would be a dangerous step for the judges to take. The judges cannot justify taking that step on the ground that it would revive a venerable tradition of English law, a golden age of constitutionalism, in which the judiciary enforced limits to the authority of Parliament imposed by common law or natural law. There never was such an age." (Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press Oxford 1999) at p 235). Lord Irvine, former Lord Chancellor of the United Kingdom has stated extra judicially that: "...representative and participatory democracy [is] the primary principle of constitutional and political theory in Britain... Thus legal sovereignty exercised by Parliament is now viewed as deriving its legitimacy from the fact that Parliament's composition is, in the first place, determined by the electorate in whom ultimate political sovereignty resides." Lord Irvine 'Sovereignty in Comparative Perspective: Constitutionalism in Britain and America' (paper presented at the James Madison Memorial Lecture New York 2000). See also M Elliott *The Constitutional Principles of Judicial Review* (Hart Publishing London 2001) at p 47.

<sup>936</sup> [1998] HCA 22 at para [12], (1998) 195 CLR 337 (Brennan CJ and McHugh J).

within the limits of a written constitution.”<sup>937</sup> A written Constitution does not alter the common law doctrine of parliamentary sovereignty.<sup>938</sup> A written Constitution merely distributes the powers of law-making between the disparate levels of government within a federal system. In *Durham Holdings Pty Ltd v New South Wales*, the High Court of Australia met arguments questioning the absolute sovereignty of State Parliaments in Australia. Referring to a large number of decisions the court stated: “These decisions equate the power of a Parliament of a State to the uncontrolled legislative authority enjoyed by the Parliament of the United Kingdom in its own sphere.”<sup>939</sup>

Parliamentary supremacy has been described as a basic principle of the legal systems of Australia and of the United Kingdom.<sup>940</sup> In *Kable v Director of Public Prosecutions (NSW)*, Justice Dawson, in dissent, stated:

“Judicial pronouncements confirming the supremacy of parliament are rare but their scarcity is testimony to the complete acceptance by the courts that an Act of Parliament is binding upon them and cannot be questioned by reference to principles of a more fundamental kind. Indeed, it is a principle of the common law itself ‘that a court may not question the validity of a statute but, once having construed it, must give effect to it according to its tenor’. There is more academic writing on

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<sup>937</sup> [2003] 3 FC 185 at para [16], and see paras [12]-[24] (FCA), aff’d *Babcock v Canada* [2002] SCC 57 at para [56], [2002] 3 SCR 3 (McLachlin CJ).

<sup>938</sup> *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24 at para [10], (1996) 189 CLR 51 (Dawson J): “The legislative power of the New South Wales legislature is no less than the legislative power of the Parliament of the United Kingdom within the scope of the grant of its power.” cf *Lange v Australian Broadcasting Corporation* [1997] HCA 25, (1997) 189 CLR 520 at p 563, where the High Court of Australia stated: “The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature. It placed upon the federal judicature the responsibility of deciding the limits of the respective powers of State and Commonwealth governments [*R v Kirby; Ex parte Boilermakers’ Society of Australia* [1956] HCA 10, (1956) 94 CLR 254 at 267-268]. The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form ‘one system of jurisprudence’ [*McArthur v Williams* [1936] HCA 10, (1936) 55 CLR 324 at p 347; cf *Thompson v The Queen* [1989] HCA 30, (1989) 169 CLR 1 at pp 34-35].... Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law.”

<sup>939</sup> [2001] HCA 7 at para [56], (2001) 205 CLR 399 (Kirby J).

<sup>940</sup> *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24 at para [13], (1996) 189 CLR 51 (Dawson J): “there can be no doubt that parliamentary supremacy is a basic principle of the legal system which has been inherited in this country from the United Kingdom.” In *Jackson v Attorney-General* [2005] UKHL 56 at para [102], [2006] 1 AC 262, [2005] 3 WLR 733, Lord Steyn said: “...[T]he supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law.”

the subject but it tends to dwell upon the apparent riddle posed by the question whether parliament can relinquish its powers by exercising them in order to do so. The answer to that riddle appears to lie in that area where law and political reality coincide. The same may be said of examples of extreme laws which would offend the fundamental values of our society which are sometimes suggested in disproof of parliamentary supremacy. It may be observed that a legislature wishing to enact a statute ordering that all blue-eyed babies be killed would hardly be perturbed by a principle of law which purported to deny it that power. Whether one speaks as Salmond does of ‘ultimate legal principles’, or as Kelsen does of a *grundnorm*, or as Hart does of the ‘ultimate rule of recognition’, there can be no doubt that parliamentary supremacy is a basic principle of the legal system which has been inherited in this country from the United Kingdom.”<sup>941</sup>

Earlier precedents describe parliamentary sovereignty in unqualified terms. In *Lee v Bude and Torrington Junction Railway Co* Willes J said: “I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from parliament.”<sup>942</sup> In *Madzimbamuto v Lardner-Burke*, Lord Reid, speaking for the Privy Council, said: “It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.”<sup>943</sup> And in *Duport Steels Ltd v Sirs*, Lord Edmund-Davies observed: “From time to

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<sup>941</sup> [1996] HCA 24, (1996) 189 CLR 51 at pp 73-74, citing *British Railways Board v Pickin* (1974) AC 765 at p 782 (Lord Reid); Sir Owen Dixon ‘The Common Law as an Ultimate Constitutional Foundation’ in *Jesting Pilate* (Law Book Co Sydney 1965) at p 206; Sir JW Salmond *Jurisprudence* (2<sup>nd</sup> edn Steven and Haynes London 1907) at p 125; G Winterton ‘The British Grundnorm: Parliamentary Supremacy Re-examined’ (1976) 92 Law Quarterly Review 591; and HLA Hart *The Concept of Law* (Clarendon Press Oxford 1961) at p 145.

<sup>942</sup> (1871) LR 6 CP 576 at p 582 (Willes J).

<sup>943</sup> [1968] UKPC 2, (1969) 1 AC 645 at p 723 (Lord Reid).

time some judges have been chafed by this supremacy of Parliament, whose enactments, however questionable, must be applied.”<sup>944</sup>

Similarly, the High Court of Australia said in a joint judgment in *Castlemaine Tooheys Ltd v South Australia*:

“The question whether a particular legislative enactment is a necessary or even a desirable solution to a particular problem is in large measure a political question best left for resolution to the political process. The resolution of that problem by the Court would require it to sit in judgment on the legislative decision, without having access to all the political considerations that played a part in the making of that decision, thereby giving a new and unacceptable dimension to the relationship between the Court and the legislature of the State.”<sup>945</sup>

The Court of Appeal of New South Wales has similarly stated, in *R v Elliott and Blessington*, that: “The Court should not exercise a discretion in such a way as to undermine the purpose and object of valid legislation with the effect, indeed for the purpose, that the intention of Parliament will be frustrated.”<sup>946</sup>

Other courts view the doctrine of parliamentary sovereignty as more animate. The House of Lords sees parliamentary sovereignty as an organically evolving concept intimately connected to political realities as well as to the evolving concept of law and human rights: Lord Bingham in *Jackson v Attorney-General* addressed the considerable political historical factors impacting upon parliamentary supremacy;<sup>947</sup> and Lord Hope dismissed the notion that parliamentary sovereignty was absolute and that its freedom to legislate admits of no qualification whatever. His Lordship disapproved of Lord Birkenhead LC dicta in *McCawley*

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<sup>944</sup> (1980) 1 WLR 142 at p 164, (1980) 1 All ER 529 at p 548. See also *Liyanage v The Queen* [1965] UKPC 1, (1967) 1 AC 259, where the Privy Council rejected the notion that the power of the Ceylon Parliament to make laws for the peace, order, and good government of the island was limited by an inability to pass laws which offend against fundamental principles.

<sup>945</sup> [1990] HCA 1, (1990) 169 CLR 436 at p 473.

<sup>946</sup> [2006] NSWCCA 305 at paras [75] (Spigelman CJ, Howie JJ).

<sup>947</sup> [2005] UKHL 56 at paras [9]-[20], [2006] 1 AC 262, [2005] 3 WLR 733 (Lord Bingham of Cornhill).



*v The King* that parliament's powers are uncontrolled.<sup>948</sup> "Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified."<sup>949</sup> The political and legal relationship between the United Kingdom Parliament and the European Union, and the effect of the Act of Union between England and Scotland, provide examples of the qualification of unfettered supremacy. Lord Hope also referred to the rule of law as a qualification, seeing the courts constitutional function of statutory interpretation and its dipole relationship with Parliament as a principle protecting the people from arbitrary government.<sup>950</sup>

Even Dicey himself in his seminal work *Law of the Constitution* recognized that the doctrine of parliamentary sovereignty did not provide Parliament with unfettered rights:

"Everyone, again, knows as a matter of common sense that, whatever lawyers may say, the sovereign power of Parliament is not unlimited, and that King, Lords and Commons united do not possess anything like that 'restricted omnipotence'... which is the utmost authority ascribable to any human institution. There are many enactments, and these laws not in themselves obviously unwise or tyrannical, which Parliament never would and never could pass. If the doctrine of Parliamentary Sovereignty involves the attribution of unrestricted power to Parliament, the dogma is no better than a legal fiction, and certainly is not worth the stress here laid upon it."<sup>951</sup>

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<sup>948</sup> [1920] AC 691 at p 720.

<sup>949</sup> [2005] UKHL 56 at para [104], [2006] 1 AC 262, [2005] 3 WLR 733 (Lord Hope of Craighead).

<sup>950</sup> *ibid* at paras [104]-[107]. One of the guiding principles which Lord Hope identified as arising from the recognition of the doctrine of parliamentary supremacy, and as operating as a qualification to the doctrine of parliamentary supremacy, is the principle expounded by Dicey himself, and similarly by Sir Owen Dixon, as follows: "... [O]ne of the guiding principles that were identified by Dicey at p 35 was the universal rule or supremacy throughout the constitution of ordinary law. Owen Dixon, 'The Law and Constitution' (1935) 51 LQR 590, 596 was making the same point when he said that it is of the essence of supremacy of the law that the courts shall disregard as unauthorized and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law. In its modern form,... this principle protects the individual from arbitrary government. The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based." (at para [107] (Lord Hope of Craighead), citing AV Dicey *The Law of the Constitution* (10<sup>th</sup> edn MacMillan London 1959) at p 35, and Sir Owen Dixon 'The Law and Constitution' (1935) 51 LQR 590 at p 596).

<sup>951</sup> AV Dicey *Law of the Constitution* (MacMillan London 1920) at p 69, cited in O'Halloran 'Inherent Rights' in *Obiter Dicta* (Spring edn student journal of Osgoode Hall Law School 1948) at p 30, cited with approval in *R v Lindsay* [2003] BCSC 1203 at para [21], (2003) 110 CRR(2d) 30 (British Columbia Supreme Court).

The doctrine of parliamentary supremacy is not so much a Hobbesian concept of *Leviathan* as a Montesquieuan concept. Perhaps the best way to understand the doctrine of parliamentary sovereignty is in Montesquieuan terms: that is, that the doctrine describes the relations within the constitutional system of government and the relations of different types of law to each other. Parliamentary sovereignty is not especially a doctrine about the power of Parliaments to make laws – that is a political as well as a legal fact. Parliamentary sovereignty is also concerned with the structure or hierarchy of the laws and the relations between legislative enactments and the common law. The judiciary thus has a pivotal and paramount role in determining the character and effect of laws created by Parliament and the relation of these laws, as they are interpreted, to the common law. This is not to say that there are fundamental principles which might invalidate legislative enactments. The doctrine of parliamentary supremacy ensures that courts will give effect to legislative enactments. But this doctrine also ensures that the courts play their role under the Constitution, by interpreting the scope and effect of those legislative enactments. The judicial role – judicial performance – is subsumed within the doctrine of parliamentary sovereignty and the principles of statutory interpretation are thus intricately connected with the doctrine of parliamentary sovereignty. Dicey reminds us that: “There is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament. Language which might seem to imply this amounts in reality to nothing more than the assertion that the judges, when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate the ordinary rules of morality, or the principles of international law, and will, therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines of both private and of international morality... The plain truth is that our tribunals uniformly act on the principle that a law alleged to be a bad law is *ex hypothesi* a law, and therefore entitled to obedience by the Courts.”<sup>952</sup>

Parliamentary sovereignty may thus be summarised as a common law doctrine explaining the dipole relations between Parliament and the courts, on the one hand, and a doctrine explaining the relations of statute law and common law whereby the courts recognize *ex hypothesi* the power of the supreme legislature to make laws and to alter the common law,

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<sup>952</sup> AV Dicey *Law of the Constitution* (MacMillan London 1920) at pp 60-61.

giving effect to such law by performing their constitutional judicial function to interpret those enactments. Coke rightly spoke of the doctrine of parliamentary sovereignty as doctrine not only *of* the common law, but *concerning* the common law. In the *First Institute* Coke acknowledged that only Parliament controlled, and could alter, the common law: '[t]he common law hath no controller in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remains still.'<sup>953</sup> And in *The Case of Proclamations* he said that "the King cannot change any part of the common law, nor create any offence by his proclamation... without Parliament."<sup>954</sup>

In the context of a publicly exhibited sporting event staged at a public place such as a beach, park, village or town green, or common, under a purported license or written approval from a local government, the local government's action in granting a license or approval or in promulgating a by-law that such activities cannot occur without the license or written approval of the local government changes the common law. The local government's action changes the common law because the local government purports to exercise a power to excuse a common law offence which impinges public rights. The doctrine of parliamentary supremacy applies in such circumstances, and a court assessing the lawfulness of a local government's actions, or a local government's by-laws, will hold that a local government will only have the power to alter the common law if that power is devolved to them from the supreme legislature. Parliamentary sovereignty is concerned not only with the supremacy of parliament's power to make laws, but also with the logical structuring of law and the idea that subordinate powers must exercise their power within the strict confines of the grant of power from the supreme legislature. The doctrine of parliamentary sovereignty safeguards common law rights as much as statutory ones. The judiciary performs a fundamental constitutional function by recognizing the law-making supremacy of Parliament and by interpreting Parliament-made law.

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<sup>953</sup> C Butler (ed) *Sir Edward Coke First Institutes* (19<sup>th</sup> edn Clarke London 1832) at 115b.

<sup>954</sup> 12 Co Rep 74 at p 75, 77 ER 1352 at p 1353, [1610] EWHC KB J22. See also JD Goldworthy *The Sovereignty of Parliament* (Oxford University Press Oxford 1999) at p 112.

### 3. Judicial performance and the dipole of Parliament and the courts

In *British Railways Board v Pickin*, Lord Simon referred to the parliamentary justiciary dipole within the constitution in the following terms:

“It is well known that in the past there have been dangerous strains between the law courts and Parliament – dangerous because each institution has its own particular role to play in our constitution, and because collision between the two institutions is likely to impair their power to vouchsafe those constitutional rights for which citizens depend on them. So for many years Parliament and the courts have each been astute to respect the sphere of action and the privileges of the other...”<sup>955</sup>

The judiciary will – in the performance of their constitutional role – preserve their sphere of influence and safeguard common law rights by ensuring, through the rules of statutory construction, that only statutory provisions which use clear and unambiguous words will sufficiently abolish or modify fundamental common law principles or rights.<sup>956</sup> In

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<sup>955</sup> [1974] UKHL 1, [1974] AC 765 at p 799 (Lord Simon of Glaisdale), and see also at p 788 (Lord Reid), cited with approval in *R v Elliott and Blessington* [2006] NSWCCA 305 at para [78] (Spigelman CJ, Howie J); and *Egan v Chadwick & Ors* [1999] NSWCA 176 at para [91] (Spigelman CJ).

<sup>956</sup> In *Potter v Minahan*, O'Connor J said: 'It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.' *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304. Justice O'Connor quoted these words from *Maxwell on Statutes* with obvious approval. Aff'd: *Bropho v Western Australia* [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18; *Coco v The Queen* (1994) 179 CLR 427 at pp 436-437; *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ). In *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14 at para [27]-[29], 204 CLR 290 at pp 298-99 McHugh J noted that: "Courts have long held that a statute should not be construed as amending fundamental principles, infringing common law rights or departing from the general system of law unless it does so with 'irresistible clearness'. The legislative intention to do so, it is often said, must be 'unambiguously clear'." In *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ) referred to "a well established and conservative principle of interpretation that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law." There is a presumption against a parliamentary intention to infringe upon such rights and freedoms: *R v Secretary of State for the Home Department; Ex parte Pierson* [1997] UKHL 37, [1998] AC 539 at p 587 (Lord Steyn). "Fundamental rights cannot be overridden by general or ambiguous words": *R v Secretary of State for the Home Department; Ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 at p 131 (Lord Hoffmann). See also *Benson v Northern Ireland Road Transport Board* (1942) AC 520 at pp 526-527. See further discussion under heading 'Statutory Interpretation' in this Chapter.

recognizing the supreme authority of parliament to make laws, and in properly interpreting the scope and effect of legislative enactments, by performing their constitutional judicial function, the courts safeguard common law public rights. It is not argued that there are fundamental common law rights which go so deep that even Parliament cannot be accepted by the Courts to have destroyed them.<sup>957</sup> It is not suggested that any of the public rights discussed in this thesis – the public right of way, the public right to quietude, the public right to peace, or the public right to recreation – are of a ‘fundamental’ nature in the sense that they may not be abrogated by Parliament. Parliament has supremacy with respect to the making of laws. Rather, what is here asserted is that the courts will only declare these common law public rights to be abrogated, and the common law of public nuisance thus altered, when Parliament uses clear and unambiguous terms in exercising its sovereignty. Parliamentary supremacy is a common law concept that endorses the supreme legislature with the law-making powers whilst simultaneously endorsing the judicature with the authority to give effect to the law as created by the supreme legislature by interpreting those legislative enactments. In the absence of clear unambiguous terms that the staging of publicly exhibited sporting events at public places do not create a public nuisance by impinging on common law public rights, the courts will obfuscate any statutory law or grant of power which purports to have the effect of altering these common law public rights.

Courts view the doctrine of parliamentary supremacy as ineluctably encompassing the judicial function of statutory interpretation. Parliamentary sovereignty, as a doctrine, only has meaning where the judiciary are fulfilling their constitutional role of interpreting the law-making authority of Parliament. In *Kable v Director of Public Prosecutions (NSW)*, Dawson J noted that: “The doctrine of parliamentary supremacy is a doctrine as deeply rooted as any in the common law. It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should give unquestioned effect to it accordingly.”<sup>958</sup>

Dawson J also adopted Sir Owen Dixon’s extra judicial reference to: “a proposition of the

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<sup>957</sup> In *Durham Holdings Pty Ltd v New South Wales* [2001] HCA 7 at para [62], (2001) 205 CLR 399, Kirby J noted that, in Australia at least, the common law operates within an orbit of written constitutional laws and political realities and that: “There are thus no common law rights which lie so deep that even a parliament may not contradict them”, citing *Lange v Australian Broadcasting Corporation* [1997] HCA 25, (1997) 189 CLR 520 at p 566; *Lipohar v The Queen* [1999] HCA 65, (1999) 74 ALJR 282 at p 291, (1999) 168 ALR 8 at p 22; *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, (2000) 74 ALJR 1109 at p 1118, (2000) 172 ALR 625 at p 638. cf *Fraser v State Services Commission* (1984) 1 NZLR 116 at p 121 (Cooke J).

<sup>958</sup> [1996] HCA 24, (1996) 189 CLR 51 at p 76.

common law that a court may not question the validity of a statute but, once having construed it, must give effect to it according to its tenor.”<sup>959</sup> Similarly, Lord Bingham in *Jackson v Attorney General*, spoke of only ‘properly interpreted’ statutes as enjoying the highest legal authority within British constitutional law: “...the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority.”<sup>960</sup>

In determining whether a local government has power to dispense with the common law and to license the commission of a common law public nuisance, in circumstances where a publicly exhibited sporting event creates a public nuisance by impinging on public rights, courts will apply the rules of statutory interpretation. The doctrine of parliamentary sovereignty ensures that all local government’s must derive any and all their purported powers from the legislative enactments of the supreme legislature, subject always to judicial interpretation of the tenor and effect of that legislatively based devolution of power. Judicial review of devolved powers and administrative action can be viewed as merely an aspect of the proper role of the courts in both recognising and enforcing parliamentary sovereignty

#### 4. Statutory interpretation

In some common law jurisdictions specific rules of statutory interpretation have developed to determine the nature and extent of the powers of local or municipal governments. The ‘Dillon Rule’ of statutory construction, which has been affirmed by the Supreme Court of the United States and the Supreme Court of Canada, states that municipal governments only have the powers that are expressly granted to them by the state legislature, those that are necessarily implied from that grant of power, and those that are essential and indispensable to the municipality’s existence and functioning. Any fair, reasonable doubt concerning the

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<sup>959</sup> *ibid* at pp 73, citing Sir Owen Dixon ‘The Common Law as an Ultimate Constitutional Foundation’ in *Jesting Pilate* (Law Book Co Sydney 1965) at p 206.

<sup>960</sup> [2005] UKHL 56 at para [9], [2006] 1 AC 262, [2005] 3 WLR 733 (Lord Bingham of Cornhill).

existence of power is resolved by the courts against the corporation, and the power is denied.<sup>961</sup>

This strict rule of construction of the powers of local government rests on the prevailing constitutional theory that the relationship of local governments to the state is a unitary one and that no local government has sovereign powers. Local governments are the creations of the State, and the powers, functions, and responsibilities that they exercise are entirely delegated or granted to them by the supreme legislature. “Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control.”<sup>962</sup> In *Merrill v Monticello*, the United States Supreme Court said: “As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined, in their operations, to the mode and manner and subject-matter prescribed.”<sup>963</sup>

In *Hunter v Pittsburgh*, the Supreme Court of the United States spelled out in clear detail the nature of local government and the extent of local government power:

“Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. For the purpose of executing

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<sup>961</sup> JF Dillon *Commentaries on the Law of Municipal Corporations* (4<sup>th</sup> edn Little Brown Boston 1890) at s 89; *Merrill v Monticello* [1891] USSC 79, 138 US 673 (1891), reaf’d. *Hunter v Pittsburgh* 207 US 161 (1907), citing OW Holmes Jr *Kent: Commentaries on American Law* (12<sup>th</sup> edn Little Brown Boston 1884) vol 2, at pp 298-99, and JF Dillon *Commentaries on the Law of Municipal Corporations* (4<sup>th</sup> edn Little Brown Boston 1890) at s 89. The Supreme Court of Canada applied Dillon’s rule, as expressed in SM Makuch, N Craik & SB Leisk, *Canadian Municipal and Planning Law*, (2<sup>nd</sup> edn Thomson-Carswell Toronto 2004) at p 82, in *Morguard Properties Ltd v Winnipeg* [1983] SCC 33, (1983) 3 DLR(4<sup>th</sup>) 1 at pp 12-13; and *R v Sharma* [1993] SCC 165, [1993] 1 SCR 650 at p 668. cf The “benevolent construction” or “broad and purposive” rule of construction that allowed for a more generous interpretation of municipal powers, first adopted by the Supreme Court of Canada in *Nanaimo (City) v Rascal Trucking Ltd* [2000] SCC 13 at paras [36]-[37], [2000] 1 SCR 342, 49 BCLR(3d) 164 applying *Shell Canada Products Ltd v Vancouver* [1994] SCC 115, [1994] 1 SCR 231 at pp 244 and 248 (McLachlin J); aff’d *Croplife Canada v Toronto* [2005] ONCA 15709 at paras [16]-[19] and [33], (2005) 75 OR(3d) 357, (2005) 254 DLR(4<sup>th</sup>) 40. See also *Hamilton (City) v Hamilton Distillery Co* [1907] SCC 1, (1907) 38 SCR 239; *Howard v Toronto (City)* (1928) 61 OLR 563 (CA); *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA); and *Kuchma v Tache (Rural Municipality)* [1945] SCR 234.

<sup>962</sup> *Clinton v Cedar Rapids and the Missouri River Railroad* 24 Iowa 455 (1868).

<sup>963</sup> [1891] USSC 79, 138 US 673 (1891).

these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.”<sup>964</sup>

In *Breard v Alexandria*,<sup>965</sup> and in *Avery v Midland County*,<sup>966</sup> the United States Supreme Court reiterated that local governments: “have only such powers as are delegated them by the State of which they are a subdivision, and when they act they exercise the State’s sovereign

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<sup>964</sup> [1907] USSC 157, 207 US 161 at pp 178-79; followed in *City of Trenton v State of New Jersey* [1923] USSC 123, 262 US 182 at pp 186-87, 43 S Ct 534 at p 536; *Reynolds v Sims* [1964] USSC 202, 377 US 533, 84 S Ct 1362; *City of Inglewood v City of Los Angeles* [1972] USCA9 44 at para [24], 451 F2d 948; *Lyes v City of Riviera Beach Florida* [1999] USCA11 303 at para [46], 166 F 3d 1332; *Barefoot v City of Wilmington III* [2002] USCA4 183 at para [11], 306 F 3d 113; *Professional Lawn Care Association v Village of Milford* [1990] USCA6 1384 at para [48], 909 F2d 929: “Municipal bodies are ‘essentially creatures of the state.’ (*South Macomb Disposal Authority v Township of Washington* [1986] USCA6 857, 790 F2d 500 at p 507 (6th Cir 1986) (Engel J concurring)). They are ‘created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.’ (*Kelley v Board of Educ. of Nashville & Davidson County* [1988] USCA6 488, 836 F2d 986 at p 994 (6th Cir 1987), quoting *Hunter v Pittsburgh* [1907] USSC 157, 207 US 161 at p 178, 28 S Ct 40 at p 46 (1907)).” *Louisiana ex rel Folsom v Mayor of New Orleans* [1883] USSC 222, 109 US 285 at p 287, 3 S Ct 211 at p 213: “Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits.”

<sup>965</sup> [1951] USSC 71, 341 US 622 at p 640, 71 S Ct 920 at p 931.

<sup>966</sup> [1968] USSC 60, 390 US 474 at p 480, 88 S Ct 1114 at p 1118.



power.” In *R v Greenbaum*, the Supreme Court of Canada stated tersely that: “Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute. It follows that the exercise of a municipality’s statutory powers... is reviewable to the extent of determining whether the actions are *intra vires*.”<sup>967</sup> And In *Verdun (City) v Sun Oil Co*, Fauteux J articulated the then restrictive approach to statutory construction of local government powers in Canada in this way: “That the municipalities derive their legislative powers from the provincial Legislature and must, consequently, frame their by-laws strictly within the scope delegated to them by the Legislature, are undisputed principles.”<sup>968</sup>

Dillon’s rule of statutory construction of local government’s legislatively devolved powers is consonant with the doctrine of parliamentary sovereignty. Yet neither decision of the United States Supreme Court in *Merrill v Monticello*,<sup>969</sup> and in *Hunter v Pittsburgh*,<sup>970</sup> have been considered by a court in Australia or in England. Even in New South Wales where section 51 of the Constitution Act 1902 (NSW) speaks directly of the nature and extent of local government powers, authorities, duties and functions as being in every respect determined only by the Legislature and subject to the will of Legislature, which may “from time to time” choose to establish a local government system of government,<sup>971</sup> Dillon’s strict rule of statutory construction remains unrecognised. The general rule of construction applying to the statutory grant of powers to local authorities in English and Australian jurisprudence is the reasonableness test first articulated by Lord Russell in *Kruse v Johnson*:

“I do not mean to say that there may not be cases in which it would be the duty of the court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly

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<sup>967</sup> [1993] SCC 166, [1993] 1 SCR 674 at p 687 (Iacobucci J).

<sup>968</sup> [1951] SCC 53, [1952] 1 SCR 222 at p 228.

<sup>969</sup> [1891] USSC 79, 138 US 673 (1891).

<sup>970</sup> [1907] USSC 157, 207 US 161 (1907) at pp 178-79.

<sup>971</sup> The exact words of s 51 Constitution Act 1902 (NSW) reads:

“(1) There shall continue to be a system of local government for the State under which duly elected or duly appointed local government bodies are constituted with responsibilities for acting for the better government of those parts of the State that are from time to time subject to that system of local government.

(2) The manner in which local government bodies are constituted and the nature and extent of their powers, authorities, duties and functions shall be as determined by or in accordance with laws of the Legislature.”

unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, ‘Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires’. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.”<sup>972</sup>

Lord Russell’s dictum in *Kruse v Johnson* has been followed by the courts as a general guide as to the construction to be given to the powers devolved on local governments.<sup>973</sup> In *Brunswick Corporation v Stewart*, Starke J apparently approved of the argument that a by-law is beyond the power of a local authority to make where it, “...is unreasonable, that is, in this connection, so oppressive or capricious that no reasonable mind can justify it (*Slattery v Naylor* (1888) 13 App Cas 446; *R v Broad* (1915) AC at p 1122; *Widgee Shire Council v Bonney* [1907] HCA 11, (1907) 4 CLR 977; *Kruse v Johnson* (1898) 2 QB at p 99).”<sup>974</sup> Williams J stated at page 99: “It is necessary to remember that the legislature has left it to the judgment of councils acting bona fide to enact such by-laws, and the exercise of their discretion should not be lightly interfered with. In the case of by-laws made by public bodies, it was pointed out by Lord Russell of Killowen LCJ in *Kruse v Johnson* that such by-laws should be

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<sup>972</sup> [1898] 2 QB 91 at pp 99-100 (Lord Russell of Killowen CJ).

<sup>973</sup> *Widgee Shire Council v Bonney* [1907] HCA 11, (1907) 4 CLR 977 at pp 982-83 (Griffith CJ) and at p 986 (Isaacs J); *Williams v Melbourne Corporation* [1933] HCA 56, (1933) 49 CLR 142 at p 150 (Starke J); *Brunswick Corporation v Stewart* [1941] HCA 7, (1941) 65 CLR 88 at p 97 (Starke J), at p 99 (Williams J).

<sup>974</sup> *Brunswick Corporation v Stewart* [1941] HCA 7, (1941) 65 CLR 88 at p 97 (Starke J). In *Brunswick Corporation v Stewart*, a local government by-law dealing with the erection and construction of buildings was challenged on the ground, among others, that it was unreasonable. The challenge was rejected by the High Court.

benevolently interpreted, and that credit should be given to those who have to administer them that they will be reasonably administered. The provisions of the by-laws which have been challenged must be approached in the light of these general principles.”<sup>975</sup> Williams J referred to unreasonableness as involving “oppressive or gratuitous interference with the rights of those who are subject to it as could find no justification in the minds of reasonable men.”<sup>976</sup>

In the earlier case *Widgee Shire Council v Bonney*,<sup>977</sup> a local government by-law was challenged on the ground, among others, that it was unreasonable. The challenge was rejected by the High Court. Griffith CJ referred to the English decisions of *Slattery v Naylor* (1888) 13 App Cas 446 and *Kruse v Johnson* [1898] 2 QB 91 and formulated the test of unreasonableness for delegated legislation in terms of “no reasonable man, exercising in good faith the powers conferred by the Statute, could under any circumstances pass such a by-law.”<sup>978</sup> Isaacs J referred with approval to two statements in the advice of the Privy Council in *Slattery v Naylor*,<sup>979</sup> namely, a by-law may be struck down as unreasonable where it is “a merely fantastic and capricious bye-law, such as reasonable men could not make in good faith” and a by-law will not “be treated as unreasonable merely because it does not contain qualifications which commend themselves to the minds of judges.”<sup>980</sup> Lockhart J in *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* subsequently confirmed this opinion, stating that: “Delegated legislation is not invalid on the ground of unreasonableness in the sense that the courts may form a different view as to what is reasonable. Unreasonableness in this branch of the law means unreasonable in the sense that ‘a merely fantastic and capricious by-law, such as reasonable men could not make in good faith’ is bad, because delegated legislation of this kind could not be regarded as an exercise of the power conferred upon the subordinate legislative body making the delegated legislation: *Slattery v Naylor* (1888) 13 App Cas 446 at 452.”<sup>981</sup> And at page 384, Lockhart J reiterated that: “Delegated legislation may be declared to be invalid on the ground of unreasonableness if it leads to

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<sup>975</sup> See also *Vanstone v Clark* [2005] FCAFC 189, (2005) 147 FCR 299 at [142]-[148]; *Qi Guang Guo v Minister for Immigration and Citizenship* [2009] FCA 356 at paras [30].

<sup>976</sup> [1941] HCA 7, (1941) 65 CLR 88 at p 99

<sup>977</sup> [1907] HCA 11, (1907) 4 CLR 977.

<sup>978</sup> *ibid* at pp 982-83.

<sup>979</sup> (1888) 13 App Cas 446 at pp 452-453.

<sup>980</sup> *ibid* at p 986.

<sup>981</sup> [1993] FCA 45, (1993) 40 FCR 381 at p 382.

manifest arbitrariness, injustice or partiality; but the underlying rationale is that legislation of this offending kind cannot be within the scope of what Parliament intended in authorising the subordinate legislative authority to enact law.”<sup>982</sup> Unreasonableness, in this sense, is connected uniquely with the question whether the actions of a local government are *ultra vires* the grant of power to them.

Lord Justice Diplock, in *Mixnam’s Properties Ltd v Chertsey Urban District Council*,<sup>983</sup> (in a passage that was apparently approved by the House of Lords),<sup>984</sup> similarly observed that: “The various special grounds upon which subordinate legislation has sometimes been said to be void – for example, because it is unreasonable; because it is uncertain; because it is repugnant to the general law or to some other statute – can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus, the kind of unreasonableness which invalidates a by-law is not the antonym of ‘reasonableness’ in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: ‘Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires’.”<sup>985</sup> This view was recently affirmed by the House of Lords. Whilst courts affirm the use of a reasonableness test in construing the ambit of local government powers, this test is invariably connected with, “...a general rule of construction that, while the legislature may make whatever changes to the law that it likes, subordinate legislative authorities can make only such changes in the law as Parliament has empowered them to make. This rule was applied in *Rossi v Magistrates of Edinburgh* (1904) 7 F (HL) 85, [and] in *Mixnam’s Properties Ltd v Chertsey Urban District Council* [1965] AC 735...”<sup>986</sup> Further, Lord Hope declared in *Stewart v Perth and Kinross Council*, again following

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<sup>982</sup> [1993] FCA 45, (1993) 40 FCR 381 at p 384; aff’d *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* [2005] NSWCA 10 at para [130] (Spigelman CJ); *Qi Guang Guo v Minister for Immigration and Citizenship* [2009] FCA 356 at para [32].

<sup>983</sup> [1964] 1 QB 214.

<sup>984</sup> See *Chertsey Urban District Council v Mixnam’s Properties Ltd* [1965] AC 735.

<sup>985</sup> [1964] 1 QB 214 at pp 237-8, cited in *Vanstone v Clark* [2005] FCAFC 189, (2005) 147 FCR 299 at [145]; in *Qi Guang Guo v Minister for Immigration and Citizenship* [2009] FCA 356 at paras [20]; and in *Stewart v Perth and Kinross Council* [2004] UKHL 16 at para [26], [2004] 28 SLLP 32, (2004) SLT 383.

<sup>986</sup> *Stewart v Perth and Kinross Council* [2004] UKHL 16 at para [26], [2004] 28 SLLP 32, (2004) SLT 383 (Lord Hope of Craighead), citing *Kruse v Johnson* [1898] 2 QB 91 at p 96 (Lord Russell of Killowen CJ). In *Rossi v Magistrates of Edinburgh* (1904) 7 F (HL) 85, conditions in an ice-cream vendors’ licence which restricted their right to open their shops when they liked and sell what they pleased were held to be ultra vires of the licensing authority; see also *Spook Erection Ltd v City of Edinburgh District Council*, 1995 SLT (Sh Ct) 107. In *Mixnam’s*

Lord Russell's dictum in *Kruse v Johnson*, that courts must look, "to the character of the body which is legislating, the subject matter, and the nature and extent of the authority which is given to the body to legislate in matters of this kind."<sup>987</sup> The reasonableness test employed by UK Courts in construing the powers of local government is now that the exercise of power must "be reasonable in the modern public law sense of that word: see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 at p 599."<sup>988</sup>

In Canada, the courts have similarly made use of a reasonableness test in construing the powers of local governments. In *Montréal (City) v Arcade Amusements Inc*, in declaring invalid a part of the Montréal by-law governing amusements, the Supreme Court of Canada adopted this classic statement of Lord Russell's in *Kruse v Johnson*, stating that: "According to that definition, by-laws are only unreasonable in the wide or legal sense, and *ultra vires*, if: (1) they are partial and unequal in operation between different classes; (2) they are manifestly unjust; (3) they disclose bad faith; and (4) they involve such oppressive or gratuitous interference with the rights of those subject to them as can find no justification in the minds of reasonable men."<sup>989</sup> This interpretation was subsequently summarized in *Montréal (City) v 2952-1366 Québec Inc*, where the Supreme Court of Canada said: "The rules governing the

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*Properties Ltd v Chertsey Urban District Council* [1965] AC 735, it was held that the local authority was not entitled under the Caravan Sites and Control of Development Act 1960 to lay down conditions relating to the licensee's powers of letting or licensing caravan spaces to its customers.

<sup>987</sup> *ibid* at para [27] citing *Kruse v Johnson* [1898] QB 91 at p 99. See also *Brunswick Corporation v Stewart* [1941] HCA 7 (1941) 65 CLR 88 at p 95, where Starke J said that the court "should have regard to the body entrusted with the power and the language in which the power is expressed and the subject matter with which the body has to deal" (aff'd *Mineralogy Pty Ltd v Body Corporate for the 'The Lakes Coolum'* [2002] QCA 550 at para [8]).

<sup>988</sup> The '*Newbury tests*' or principles were formulated by the House of Lords to test the validity of an apparently unlimited statutory power to impose planning conditions. The test of reasonableness is the third of the tests articulated in *Newbury*, which is a restatement of the test of reasonableness in the special sense expressed by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at p 229. As applied to legislatively devolved powers the test suggests that the exercise of power will be unreasonable if it does not fairly and reasonably relate to the permitted purposes of the power under the statute. Followed in *Stewart v Perth and Kinross Council* [2004] UKHL 16 at paras [70]-[71], [2004] 28 SLLP 32, (2004) SLT 383, 2004 SCLR 849 (Baroness Hale of Richmond). This test can result in construing local government powers very strictly. Hence, in *Stewart v Perth and Kinross Council* the House of Lords held that the power, in para 5(1)(b) and (2) of Schedule 1 to the Civic Government (Scotland) Act 1982, to grant a second hand motor dealer's licence on "such reasonable conditions as the licensing authority think fit" did not give the authority power to insist on a detailed inspection report being made available to all purchasers.

<sup>989</sup> [1985] 1 SCR 368 at pp 405-406 (Beetz J). The Canadian Supreme Court has recently adopted a test of reasonableness in construing municipal government powers, developed from *Kruse v Johnson* [1898] 2 QB 91 at p 99; *Hamilton (City) v Hamilton Distillery Co* [1907] SCC 1, (1907) 38 SCR 239; *Howard v Toronto (City)* (1928) 61 OLR 563 (CA); *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA); *Kuchma v Tache (Rural Municipality)* [1945] SCR 234; and *Shell Canada Products Ltd v Vancouver* [1994] SCC 115, [1994] 1 SCR 231 at pp 244 and 248: see *Nanaimo (City) v Rascal Trucking Ltd* [2000] SCC 13 at para [37], [2000] 1 SCR 342.

exercise of regulatory powers are well known. The intervention of courts in this sphere has been marked by great deference. Only an exercise of power in bad faith or for improper or unreasonable purposes will justify judicial review.”<sup>990</sup> By this rule of construction by-laws of local governments should be benevolently interpreted; by-laws should be assumed to be ‘reasonably administered’; and the courts should be reluctant to interfere with the decisions of local governments because members of local government are democratically elected.<sup>991</sup> In *Shell Canada Products Ltd v Vancouver*, Justice McLachlin in her dissentient judgment in the Supreme Court of Canada identified a more liberal approach to the construction of enabling

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<sup>990</sup> [2005] SCC 62 at para [41], [2005] 3 SCR 141, (2005) 258 DLR(4th) 595, citing *Kruse v Johnson* [1898] 2 QB 91; *Hamilton (City of) v Hamilton Distillery Co* (1907) 38 SCR 239; *Montréal (City of) v Beauvais* (1909) 42 SCR 211; *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680 (CA); *Montréal (City of) v Arcade Amusements Inc* [1985] 1 SCR 368; *Juneau v Québec (Ville de)* [1991] RJQ 2781 (CA); *Shell Canada Products Ltd v Vancouver (City)* [1994] 1 SCR 231. In *Montréal (City) v 2952-1366 Québec Inc* [2005] SCC 62, [2005] 3 SCR 141, (2005) 258 DLR(4th) 595, the Supreme Court of Canada adopted a contextual methodology of statutory interpretation in construing the powers of a municipal council by-law dealing with noise nuisances. The court held that although the legislative provision granting power was drafted using general language, and was ambiguous, a contextual interpretation by the court could resolve the ambiguity and enable the scope to be determined. The court took note of the history of the by-law, which showed that the lawmakers’ purpose was limited to control of noises that interfere with peaceful enjoyment of the urban environment.

<sup>991</sup> *Kruse v Johnson* [1898] 2 QB 91 at pp 99-100 (Lord Russell of Killowen CJ). This is the position which the courts take in New Zealand, and now in Canada. The Canadian judicial view has only very recently moved away from a strict approach to a “benevolent construction” or “broad and purposive” approach that allows for a more generous interpretation of municipal powers. This new approach was first adopted by the Supreme Court of Canada in *Nanaimo (City) v Rascal Trucking Ltd* [2000] SCC 13 at paras [36]-[37], [2000] 1 SCR 342, where the Supreme Court overturned the use of Dillon’s rule of construction which had been applied by the Court of Appeal of British Columbia (*Nanaimo (City of) v Rascal Trucking Ltd* [1998] BCCA 6119 at para [10], (1998) 161 DLR(4th) 177, (1998) 49 BCLR(3d) 164). The Supreme Court stated a new preference for a rule of construction which McLachlin J had given in her dissenting opinion in the earlier case of *Shell Canada Products Ltd v Vancouver* [1994] SCC 115, [1994] 1 SCR 231 at pp 244 and 248; aff’d *Croplife Canada v Toronto* [2005] ONCA 15709 at paras [16]-[19] and [33], (2005) 75 OR(3d) 357, (2005) 254 DLR(4th) 40. In *Shell Canada Products*, Justice McLachlin identified a more liberal approach to the construction of enabling statutes that was already reflected in such cases as *Hamilton (City) v Hamilton Distillery Co* [1907] SCC 1, (1907) 38 SCR 239; *Howard v Toronto (City)* (1928) 61 OLR 563 (CA); *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA); and *Kuchma v Tache (Rural Municipality)* [1945] SCR 234. In stating her rule of construction she concluded at p 248: “...[J]udicial review of municipal decisions should be confined to clear cases. The elected members of council are discharging a statutory duty. The right to exercise that duty freely and in accordance with the perceived wishes of the people they represent is vital to local democracy. Consequently, courts should be reluctant to interfere with the decisions of municipal councils. Judicial intervention is warranted only where a municipality’s exercise of its powers is clearly *ultra vires*, or where council has run afoul of one of the other accepted limits on municipal power.”

For New Zealand courts’ view, see *Harrison v Auckland City Council* [2008] NZHC 553 at paras [53]. The New Zealand High Court has now reaffirmed that a degree of deference to the decisions of local authorities is appropriate when determining the validity of a by-law: “Of relevance to the question of the level of deference which should apply, Conley emphasised at [75] the need for a ‘large margin of appreciation’ to apply where Parliament has entrusted a legislative task to local authorities which in turn are elected bodies. In that case, Parliament had delegated the location of brothels to the elected local authorities and had decided to maintain a measure of ongoing review of prostitution. The Court of Appeal endorsed the higher level of deference in cases where the choices involved are distinctly ones of social policy. In such circumstances, ‘...a court should be very slow to intervene, or adopt a high intensity of review.’” *Harrison v Auckland City Council* [2008] NZHC 553 at para [61] following *Conley v Hamilton City Council* [2007] NZCA 543 at para [75].

statutes observing that: “Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the ‘benevolent construction’ which this Court referred to in *Greenbaum* [[1993] SCC 166, [1993] 1 SCR 674] and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.”<sup>992</sup> Justice McLachlin’s view has been subsequently preferred and affirmed.<sup>993</sup>

Australian jurisprudence has evolved to two distinct tests of reasonableness of the exercise of delegated powers, following the High Court decision of *South Australia v Tanner*.<sup>994</sup> The cases *Slattery v Naylor*, *Kruse v Johnson*, *Widgee Shire Council*, *Williams v Melbourne Corporation*, *Brunswick Corporation v Stewart*, and *Mixnam’s Properties Ltd v Chertsey Urban District Council*, all cited above, “deal principally, if not exclusively, with the unreasonableness ground of review.” The proportionality principle is “differently focused”, and, as stated by Lockhart J in *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd*: “The fundamental question is whether the delegated legislation is within the scope of what the Parliament intended when enacting the statute which empowers the subordinate authority to make certain laws.”<sup>995</sup> In *Qi Guang Guo v Minister for Immigration and Citizenship*, the Federal Court of Australia opined: “In summary, delegated legislation may be held invalid because it is an

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<sup>992</sup> *Shell Canada Products Ltd v Vancouver* [1994] SCC 115, [1994] 1 SCR 231 at p 244; aff’d *Croplife Canada v Toronto* [2005] ONCA 15709 at paras [16]-[19] and [33], (2005) 75 OR(3d) 357, (2005) 254 DLR(4th) 40, following *Hamilton (City) v Hamilton Distillery Co* [1907] SCC 1, (1907) 38 SCR 239; *Howard v Toronto (City)* (1928) 61 OLR 563 (CA); *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA); and *Kuchma v Tache (Rural Municipality)* [1945] SCR 234.

<sup>993</sup> See nn 913 above.

<sup>994</sup> [1989] HCA 3, (1989) 166 CLR 161. As was stated by the Federal Court of Australia in *Qi Guang Guo v Minister for Immigration and Citizenship* [2009] FCA 356 at para [31]: “*Tanner* is the leading High Court case on the doctrine of reasonable proportionality in relation to delegated legislation. In that case it was held that delegated legislation will not be valid where it is not capable of being considered to be reasonably proportionate to the end to be achieved. It is not enough that the Court thinks the delegated legislation inexpedient or misguided. It must be so lacking in reasonable proportionality as not to be a real exercise of the power. The Court found support for the ground of review in the judgment of Dixon J in *Williams v Melbourne Corporation*.”

<sup>995</sup> [1993] FCA 45, (1993) 40 FCR 381 at pp 383-384.

unreasonable exercise of the empowering provision or because the delegated legislation is not reasonably proportionate to the purposes of the empowering provision. There is considerable overlap between the two grounds of review (see *De Silva v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 502 at 510). As the Court does not have authority to conduct merits review, the test in the case of each ground of review is a very demanding one and, in the final analysis, involves a question of whether the delegated legislation represents a real exercise of the power in the empowering section. Cases in which delegated legislation has been held invalid on either ground of review are rare.”<sup>996</sup>

In both *Qi Guang Guo v Minister for Immigration and Citizenship*, and the earlier case of *Vanstone v Clark*,<sup>997</sup> the Federal Court cited *Williams v Melbourne Corporation*, where Dixon J said:

“To determine whether a by-law is an exercise of a power, it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject. The true nature and purpose of the power must be determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is intended to apply. Notwithstanding that ex

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<sup>996</sup> [2009] FCA 356 at paras [35]. The court went on to consider examples of case law where the two distinct tests were used, noting at para [35]: “Examples of cases in which regulations under the Act have been held invalid on the unreasonableness ground are *Minister for Immigration and Multicultural Affairs v Singh* [2000] FCA 377, (2000) 98 FCR 77 and *Li v Minister for Immigration and Multicultural Affairs* [1999] FCA 1147, (1999) 94 FCR 219. Examples of cases in which delegated legislation has been held invalid on the reasonable proportionality ground of review are *Re Gold Coast City Council By-laws* [1994] 1 Qd R 130, *Paradise Projects Pty Ltd v Gold Coast City Council* [1994] 1 Qd R 314, *Re Gold Coast City (Touting and Distribution of Printed Matter) Law 1994* (1995) 86 LGREA 288 and *House v Forestry Tasmania* [1995] TASSC 95, (1995) 5 Tas R 169. Before leaving this brief review of the cases, I refer to the illuminating discussions of the relevant principles in *De Silva v Minister for Immigration and Multicultural Affairs* and *Vanstone v Clark* [2005] FCAFC 189, (2005) 147 FCR 299 at 331-343 [99]- [160] per Weinberg J.” In *Vanstone v Clark* [2005] FCAFC 189, (2005) 147 FCR 299 at [148], the court noted any distinction between English and Australian tests of unreasonableness as overstated: “Though Lockhart J [in *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* [1993] FCA 45 (1993) 40 FCR 381 at p 384] spoke of ‘unreasonableness’, his Honour plainly had in mind the considerations that now tend to be subsumed within the notion of ‘reasonable proportionality’. The move from ‘unreasonableness’ to ‘lack of reasonable proportionality’ appears linked to the increasing use by the High Court of the latter concept in certain aspects of constitutional law: see generally B Selway ‘The Rise and Rise of the Reasonable Proportionality Test in Public Law’ (1996) 7 Public Law Review 212. This appears to reflect a divergence from the approach in the United Kingdom, where ‘unreasonableness’ per se is still regarded as a ground for invalidating subordinate legislation. See generally HWR Wade and CF Forsyth *Administrative Law* (8<sup>th</sup> edn 2000) at 860-2. Nonetheless, there are dicta, even in this country, that suggest that regulations can be challenged purely on the basis of unreasonableness: *De Silva v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 502. Likewise, see *Visa International Service Association v Reserve Bank of Australia* [2003] FCA 977, (2003) 131 FCR 300 at 467-8 per Tamberlin J.”

<sup>997</sup> [2005] FCAFC 189, (2005) 147 FCR 299.



facie there seemed a sufficient connection between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not have reasonably have been adopted as a means of attaining the ends of the power. In such a case, the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power.”<sup>998</sup>

*Williams v Melbourne Corporation* concerned the reasonableness of a by-law regulating traffic in Melbourne. Justice Starke noted: “The by-law deals with the passage of cattle in and through the streets of the city. It prohibits the use of most streets, and permits the use of others. Such a by-law concerns the subject of traffic, and regulates it. Prima facie, therefore, it is within the ambit of the power conferred by the Local Government Act.”<sup>999</sup> The nature of the power which a local government purports to exercise in respect of authorizing the staging of a publicly exhibited sporting event is, however, very different to their power to ‘regulate’ (as was the case in *Williams v Melbourne Corporation*). The license to a publicly exhibited sporting event purports to grant a right to exclusive use of a public place such as a road, beach or park, to the exclusion of the public’s use of these places. This is not the exercise of a power to ‘regulate’ whereby rights of use are preserved but are managed in order to afford equitable use of public places amongst the disparate users of those public places as was highlighted in *Williams v Melbourne Corporation*. It was claimed that the by-law in *Williams v Melbourne Corporation* was unreasonable, and “cannot reasonably be regarded as being within the scope or ambit or purpose of the power.” To this Justice Starke responded: “It is well settled that the Court is not entitled to form its own opinion as to the reasonableness of a by-law and if it thinks it unreasonable, though within the scope of the powers granted, to declare it invalid. Griffith CJ said in *Widgee Shire Council v Bonney*... that since the cases of *Slattery v Naylor* and *Kruse v Johnson* it is very difficult to make a successful attack on a by-law on this ground... *Slattery v Naylor*, however, recognizes that ‘a merely fantastic and capricious by-law, such as reasonable men could not make in good faith’ would

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<sup>998</sup> [1933] HCA 56, (1933) 49 CLR 142 at p 155, cited *Qi Guang Guo v Minister for Immigration and Citizenship* [2009] FCA 356 at para [27]; *Vanstone v Clark* [2005] FCAFC 189, (2005) 147 FCR 299 at [155]; *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* [2005] NSWCA 10 at para [130] (Spigelman CJ); *Frankham v Adelaide City Council* [2004] SASC 263 at para [35].

<sup>999</sup> [1933] HCA 56, (1933) 49 CLR 142 at p 150 (Starke J).

be bad, for such a by-law could not in any proper sense be regarded as an exercise of the power conferred upon the authority making the by-law.”<sup>1000</sup>

It is certainly within the power of local governments, pursuant to Local Government Acts, to regulate the use of public places by creating by-laws limiting the time of day when a public place is open to the public, or by designating some of the public spaces within their jurisdiction for the use of particular public purposes or public sports, such as a Zoo or a cricket ground. Such acts are, *prima facie*, within the powers devolved to local governments from the supreme legislature.<sup>1001</sup> Justice Starke observed in *Williams v Melbourne Corporation*, citing Isaacs J in the earlier case of *Melbourne Corporation v Barry*, that: “A power to regulate traffic does not warrant an absolute prohibition of all traffic, but it does involve more than restrictions upon the conduct of persons in traffic, and extends in my opinion to the regulation of the times when, and the streets, roads or routes in which, traffic may proceed.”<sup>1002</sup> But where a local government purports to grant by license to a sporting association, or to a pecuniarily motivated sports promotion company, the exclusive use of a public place which is otherwise designated to public use (however limited in time and manner of use that public place may be made available to the public by by-laws), a local authority may be said to be going beyond its power to ‘regulate’ and may, in fact, be complicit in the commission of a common law public nuisance offence. It was affirmed in *Williams v Melbourne Corporation* that power to regulate use cannot warrant a prohibition of use.<sup>1003</sup> Noting the dicta of Higgins and Isaacs JJ in the earlier High Court case of *Melbourne Corporation v Barry*,<sup>1004</sup> Starke J was of the opinion that: “And, while ‘every regulation implies restraint, prohibition in some degree,’ the limit is reached, as I understand the argument, if the by-law goes beyond rules of conduct for the behaviour of persons in traffic, that is, for

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<sup>1000</sup> *ibid* at pp 149-150, citing *Widgee Shire Council v Barry* (1907) 4 CLR 977 at pp 982-83 (Griffith CJ); *Slattery v Naylor* (1888) 13 App Cas 446; and *Kruse v Johnson* (1898) 2 QB 91.

<sup>1001</sup> See *Melbourne Corporation v Barry* [1922] HCA 56, (1922) 31 CLR 174 at pp 199 (Isaacs J), at p 207 (Higgins J); *Williams v Melbourne Corporation* [1933] HCA 56, (1933) 49 CLR 142 at pp 148-49, *Herald and Weekly Times Ltd v VCAT* [2005] VSC 44 at para [15]. See eg s 60 of the Local Government Act 2009 (Qld) and s 46 Local Government Act (NSW).

<sup>1002</sup> [1933] HCA 56, (1933) 49 CLR 142 at pp 148-149, citing *Melbourne Corporation v Barry* [1922] HCA 56, (1922) 31 CLR 174 at pp 199 (Isaacs J).

<sup>1003</sup> [1933] HCA 56, (1933) 49 CLR 142 at pp 148-49, citing with approval *Municipal Corporation of City of Toronto v Virgo* (1896) AC 88; *Attorney-General for Ontario v Attorney-General for the Dominion* (1896) AC 348; *Melbourne Corporation v Barry* [1922] HCA 56, (1922) 31 CLR 174.

<sup>1004</sup> [1922] HCA 56, (1922) 31 CLR 174 at pp 199 (Isaacs J), at p 207 (Higgins J).

their behaviour when passing to and fro along any street or road or route, with or without vehicles or animals.” Justice Dixon in *Williams v Melbourne Corporation*, stated similarly at page 156: “...The ultimate question in the present case appears to me to be whether, when applied to the conditions of Melbourne, the bylaw involves such an actual suppression of the use of the streets for the purposes of the necessary transit of an important and ordinary commodity as to go beyond any restraint which could be reasonably adopted for the purpose of preserving the safety, convenience and proper facility of traffic in general.” Justice Dixon’s use of the word ‘suppression’ is potent. ‘Suppression’ has direct relation to public rights. In granting a license to a sports association for the exclusive use of a public place such as a beach, park or road, in order to conduct a publicly exhibited sporting event, to the detriment of the public’s right to use of such places, the power of a local council may be appropriately termed ‘an actual suppression’ of the public’s rights of use of those public places consistent with their purpose.

Rules of statutory construction may be affected by whether a court adopts a unitary view of local government, expressed as Dillon’s rule, or a benevolent view of local government where deference is shown to local government decisions because of the fact the local government members are democratically elected.<sup>1005</sup> Whether local government power is to be viewed in a broad manner or strictly can be critically important when considering the extent of local government power in respect of public places such as roads, beaches, parks, village or town greens, or commons. Is their power comprehensive? Or is their power properly cognizable only in the context of their care and management responsibilities. Is their grant of power from the legislature so extensive that a local government can effectively ‘legislate’ to overturn long standing common law rules protecting public rights? Could Parliament really have intended to grant such extensive power to a subordinate, and principally administrative, body? Or is local government power in respect of public places

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<sup>1005</sup> For Dillon’s rule cases applying strict rules of construction of local government power see *Merrill v Monticello* [1891] USSC 79, 138 US 673 (1891); *Hunter v Pittsburgh* [1907] USSC 157, 207 US 161 (1907) at pp 178-79; and *Verdun (City) v Sun Oil Co* [1951] SCC 53, [1952] 1 SCR 222. For the benevolent rule of construction see *Kruse v Johnson* [1898] 2 QB 91 at pp 99-100 (Lord Russell of Killowen CJ); *Widgee Shire Council v Bonney* [1907] HCA 11, (1907) 4 CLR 977 at pp 982-83 (Griffith CJ) and at p 986 (Isaacs J); *Williams v Melbourne Corporation* [1933] HCA 56, (1933) 49 CLR 142 at p 150 (Starke J); *Brunswick Corporation v Stewart* [1941] HCA 7, (1941) 65 CLR 88 at p 97 (Starke J), at p 99 (Williams J); *Nanaimo (City) v Rascal Trucking Ltd* [2000] SCC 13 at paras [36]-[37], [2000] 1 SCR 342; *Shell Canada Products Ltd v Vancouver* [1994] SCC 115, [1994] 1 SCR 231 at pp 244 and 248; aff’d *Croplife Canada v Toronto* [2005] ONCA 15709 at paras [16]-[19] and [33], (2005) 75 OR(3d) 357, (2005) 254 DLR(4th) 40.

essentially an ‘administrative’ power, where local governments have care and management responsibilities in respect of public property? If we apply Dillon’s rule we state, effectively, that local government power is predominantly administrative in its scope and that any power or by-law of a local government must be reasonably and fairly consistent with its care and management responsibilities. If the supreme legislature which grant powers to local governments desire local governments to possess powers to alter either common law or statute law, they must do so by using express words in legislation granting such power. If we apply the benevolent construction rule we state, effectively, that local government power is similar to the legislative power of the supreme legislature and that local governments may make local by-laws which alter the common law and may license acts which are common law offences without the express grant of such power to so do in enabling legislation. The danger in adopting a benevolent rule of construction is that judges, in construing an Act of Parliament granting power to a local government in a broad fashion, may in fact be reading words into the legislative provision granting power and may be extending the scope of that power beyond what was intended. Local governments will always claim a more extensive power than that which is actually devolved to them under statute. Yet the High Court of Australia’s position on this methodology of interpretation is clear: “It is no power of the judicial function to fill gaps disclosed in legislation.”<sup>1006</sup> And further: “To read words into any statute is a strong thing and, in the absence of clear necessity, a wrong thing.”<sup>1007</sup>

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<sup>1006</sup> *Marshall v Watson* (1972) 124 CLR 640 at p 648 (Stephen J). See also *Council of the City of Parramatta v Brickworks Ltd* (1971) 128 CLR 1 at 12; *Footscray City College v Ruzicka* (2007) 16 VR 498 at para [6]; and *Cornwell v Lavender* (1991) 7 WAR 9 at p 23.

<sup>1007</sup> *Western Australia v Commonwealth* (1975) 134 CLR 201 at p 251 (Stephen J). Examples of where courts have read words into the text of a statute in order to construe the meaning of the statute include the English cases of *Jones v Wrotham Park Settled Estates* [1980] AC 74 at p 105 (Diplock LJ), and *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at p 592 (Lord Nicholls). The Supreme Court of Canada has also utilized, in a constitutional context, a methodology of reading words into legislation in order to ensure compliance with the Canadian Charter of Rights: *Schacter v The Queen* [1992] 2 SCR 679 at p 698, (1992) 93 DLR(4<sup>th</sup>) 1 at pp 12–13. In *Inco Europe* Lord Nicholls was of the opinion that a task of reading words into a statute, as an element of the process of statutory interpretation, can only be employed to “correct obvious drafting errors” in a statute. His Lordship stated: “In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words... This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretive. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words...” ([2000] 1 WLR 586 at p 592). Justice Spigelman explained these cases, and the interpretive methodology used by the justices in those cases in the following manner: “The process remains one of construction if the words actually used by the Parliament are given an effect *as if* they contained additional words. That is not, however, to ‘introduce’ words into the Act. It is to construe the words actually used. Interpretation must always be text based. The reformulation of a statutory provision by the addition or deletion of words should be understood as a means of expressing the court’s conclusion with clarity, rather than as a precise description of the actual

The first task which a Court ought to undertake is to determine whether the ‘license’ of a local government permitting or condoning the staging of a publicly exhibited sporting event at a public place such as a road, beach, park, village or town green, or common, which is subject to the care and management responsibilities of the local government pursuant to an Act of Parliament, is *ultra vires* or *intra vires*. Whether a strict rule or a benevolent rule of construction is used, the courts in essence apply standard contextual statutory interpretation methodology in construing the nature and effect of a legislative provision.<sup>1008</sup> One very important fact which courts also take account of in employing a contextual statutory interpretation methodology is the fact that the legislatively devolved powers and responsibilities in Local Government Acts are invariably set out in clear and unambiguous

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process which the court has conducted. The authorities which have expressed the process of construction in terms of ‘introducing’ words to an Act or ‘adding’ words have all, so far as I have been able to determine, been concerned to confine the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words would suggest. I am unaware of any authority in which a court has ‘introduced’ words to or ‘deleted’ words from an Act, with the effect of *expanding* the sphere of operation that could be given to the words actually used... There are many cases in which words have been *read down*. I know of no case in which words have been *read up*.” *R v PLV* (2001) 51 NSWLR 736 at paras [87]–[88] (Spigelman J). See also J Spigelman ‘Legitimate and Spurious Interpretation’ (paper presented at McPherson Lectures University of Queensland – Statutory Interpretation and Human Rights 12 March 2008) <<http://acthira.anu.edu.au/resources/McPherson%20Lectures%2012%5B1%5D.3.08%20Third.doc>> (1 February 2009)

<sup>1008</sup> Courts are now, increasingly, emphasizing also the importance of context in interpretation. As was said in the joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at p 408: “[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means... one may discern the statute was intended to remedy.” See P Finn ‘Statutes and the Common Law – The Continuing Story’ in S Corcoran and S Bottomley (ed) *Interpreting Statutes* (Federation Press Sydney 2005) at pp 52–63. See also P Finn ‘Statutes and the Common Law’ (1992) 22 UWALR 7. Recent Canadian authorities dictate that statutes be construed purposively in their entire context and in light of the scheme of the Act as a whole with a view to ascertaining the legislature’s true intent. See *Rizzo & Rizzo Shoes Ltd (Re)* [1998] SCC 837, [1998] 1 SCR 27 at paras [21]–[23]; *M & D Farm Ltd v Manitoba Agricultural Credit Corp* [1999] SCC 648, [1999] 2 SCR 961 at para [25]; *Nanaimo (City) v Rascal Trucking Ltd* [2000] SCC 13 at paras [19]–[20]. A recent standard treatise (J Bell and Sir G Engle (eds) *Cross: Statutory Interpretation* (3rd ed Butterworths London 1995) at ch 3) expresses the basic rules of statutory interpretation this way:

- (1) The judge must give effect to the ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.
- (2) If the judge considers that the application of the words in their ordinary sense would produce an absurd result, which cannot reasonably be supposed to have been the intention of the legislature, he may apply them in any secondary meaning, which they are capable of bearing.
- (3) The judge may read in words which he considers to be necessarily implied by words which are already in the statute and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible or absurd or totally unregulated, unworkable or totally irreconcilable with the rest of the statute.

detail.<sup>1009</sup> This contextual approach, and the use of a reasonableness test, can result in Judges obfuscating Local Government Act statutory provisions to effectively render any ambiguous provisions void.<sup>1010</sup> The proper role of the courts is to determine if the relevant act or decision of a local authority was in breach of or unauthorised by the law or was beyond the scope of the power given to the decision maker by the law and was consequently of no legal effect, or if the relevant decision maker had failed to comply with the law and should be compelled to do so. In construing the nature and effect of a purported local government power to license the staging of publicly exhibited sporting events on public land, the courts will have regard for the fact that the effect of a local government ‘license’ in these circumstances is to permit the commission of a common law public nuisance and to obstruct or interfere with public rights in respect of the public place where the publicly exhibited sporting event is staged.

In consideration of the fact that common law rights may be infringed by the license of a local government authorizing the staging of a publicly exhibited sporting event, a rule of statutory construction which would hold that a local government does not possess power to license the staging of a publicly exhibited sporting event unless the Local Government Act use clear and unambiguous terms in granting such power to local governments is the appropriate rule to apply. It is not difficult for Parliament – with its vast resources – to use clear and unambiguous language in its legislative enactments devolving power to local

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<sup>1009</sup> Rather than providing a broad and general governing power, Local Government Acts invariably provide separate authority for each conceivable function of local government and set out in clear terms the nature and extent of the functions to be performed by local governments. In *R v Greenbaum* [1993] 1 SCR 674 at p 693 the Supreme Court of Canada noted that there are many limits on a municipality’s general power to adopt by-laws. In particular, when specific powers have been provided for, the general power should not be used to extend the clear scope of the specific provisions. In *Greenbaum* (at p 693), the Court agreed with Middleton JA of the Ontario Court of Appeal in *Morrison v Kingston* (1937) 69 CCC 251. At p 255 of that decision, Middleton JA had given a general description of the limits on a municipality’s regulatory powers, noting inter alia, that Local Government or Municipal Acts are very detailed in their provisions and contain clear direction as to the nature and extent of delegated power. Speaking in the context of the Municipal Act: “Very few subjects falling within the ambit of local government are left to the general provisions... Almost every conceivable subject proper to be dealt with by a municipal council is specifically enumerated in the detailed provisions in the Act, and in some instances there are distinct limitations imposed on the powers of the municipal council...” Aff’d *Montréal (City) v 2952-1366 Québec Inc* [2005] SCC 62 at para [51], [2005] 3 SCR 141, (2005) 258 DLR(4th) 595.

<sup>1010</sup> The use of the reasonableness test in *Stewart v Perth and Kinross Council* [2004] UKHL 16 at paras [70]-[71], [2004] 28 SLLP 32, (2004) SLT 383, 2004 SCLR 849 (Baroness Hale of Richmond), resulted in the House of Lords construing local government powers very strictly. The House held that the power, in para 5(1)(b) and (2) of Schedule 1 to the Civic Government (Scotland) Act 1982, to grant a second hand motor dealer’s licence on “such reasonable conditions as the licensing authority think fit” did not give the authority power to insist on a detailed inspection report being made available to all purchasers.

governments. Whilst the courts will grant a degree of latitude to local governments in the exercise of the powers delegated to them by the supreme legislature, dicta suggests that where civil or public rights are affected by local government action, the courts will use a much more stringent rule of construction when determining the nature and extent of local government power. In *Potter v Minahan*, O'Connor J said: "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness."<sup>1011</sup> In so declaring the court noted the view of *Maxwell on Statutes* that in cases where a statute affects civil rights there are certain objects which a legislature is presumed not to intend.<sup>1012</sup> "One of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares (per Trevor J in *Arthur v Bokenham* 111 Mod at p 150; See also *Harbert's Case* 23 Rep 12a at p 13b), either in express terms or by implication... In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness [32 Cranch at p 390]; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."<sup>1013</sup>

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<sup>1011</sup> *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304. Justice O'Connor quoted these words from *Maxwell on Statutes* with obvious approval. Aff'd: *Bropho v Western Australia* [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18; *Coco v The Queen* (1994) 179 CLR 427 at pp 436-437; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 at para [11], (2002) 213 CLR 543; and *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ). cf *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14 at para [27]-[29], 204 CLR 290 at pp 298-99, where McHugh J although noting that, "Courts have long held that a statute should not be construed as amending fundamental principles, infringing common law rights or departing from the general system of law unless it does so with 'irresistible clearness'" and that, "The legislative intention to do so, it is often said, must be 'unambiguously clear'"; was of the opinion that, "...[T]imes change. What is fundamental in one age or place may not be regarded as fundamental in another age or place. When community values are undergoing radical change and few principles or rights are immune from legislative amendment or abolition, as is the case in Australia today, few principles or rights can claim to be so fundamental that it is unlikely that the legislature would want to change them... Clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend [many] fundamental principles. Some rights may be the corollaries of fundamental principles. In that sense, they are fundamental rights which are presumed to continue unless the legislative language is clear and unambiguous. But nearly every session of Parliament produces laws which infringe the existing rights of individuals. Given the frequency with which legislatures now amend or abolish rights or depart from the general system of law, it is difficult to accept that it is 'in the last degree improbable' that a legislature would intend to alter rights or depart from the general system of law unless it did so 'with irresistible clearness'."

<sup>1012</sup> Sir Peter B Maxwell *On the Interpretation of Statutes* (4<sup>th</sup> edn Sweet & Maxwell London 1905) at pp 121-22.

<sup>1013</sup> *ibid*.

In *K-Generation Pty Ltd v Liquor Licensing Court*, the High Court of Australia referred to “a well established and conservative principle of interpretation that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law.”<sup>1014</sup> Furthermore, there is a presumption **against** a parliamentary intention to infringe upon common law rights and freedoms: *R v Secretary of State for the Home Department; Ex parte Pierson*.<sup>1015</sup> “Fundamental rights cannot be overridden by general or ambiguous words”: *R v Secretary of State for the Home Department; Ex parte Simms*.<sup>1016</sup> In the leading New Zealand case on the unreasonableness test used for construing the nature of by-laws, *McCarthy v Madden*, the New Zealand High Court stated that: “A bylaw which destroys or unnecessarily interferes with a public right without producing a corresponding benefit to the inhabitants of a locality will be unreasonable.”<sup>1017</sup> In *Bropho v Western Australia*, the High Court of Australia declared there existed:

“[O]ther ‘rules of construction’ which require clear and unambiguous words before a statutory provision will be construed as displaying a legislative intent to achieve a particular result. Examples of such ‘rules’ are those relating to the construction of a statute which would abolish or modify fundamental common law principles or rights (see, eg, *Benson v Northern Ireland Road Transport Board* (1942) AC 520 at pp 526-527)...

<sup>1014</sup> [2009] HCA 4 at para [47] (French CJ).

<sup>1015</sup> [1997] UKHL 37, [1998] AC 539 at p 587 (Lord Steyn).

<sup>1016</sup> [1999] UKHL 33, [2000] 2 AC 115 at p 131 (Lord Hoffmann). See also *Benson v Northern Ireland Road Transport Board* (1942) AC 520 at pp 526-527.

<sup>1017</sup> (1914) 33 NZLR 1251 at pp 1268-70; aff'd *Harrison v Auckland City Council* [2008] NZHC 553 at paras [51]-[53]. The principles of law, as distilled in *McCarthy v Madden* are that: “(a) A bylaw is not unreasonable merely because particular Judges may think that it goes further than is prudent, necessary or convenient;... [but] (c) Where a bylaw affects a public common law right such as the right to use roads for the purpose of traffic, it will be scrutinised with greater care than a bylaw which affects only the particular rights of inhabitants within the local authority district;... (f) A bylaw regulating the exercise of a public right must take into consideration general legislation on the same subject, and not be framed in such a way as necessarily to destroy that public right; and (g) A bylaw which destroys or unnecessarily interferes with a public right without producing a corresponding benefit to the inhabitants of a locality will be unreasonable.” (*Harrison v Auckland City Council* [2008] NZHC 553 at paras [51]-[53]). “The reasonableness of a bylaw can only be ascertained in relation to the surrounding facts, including the nature and condition of the locality in which it is to take effect; the evil, danger or inconvenience which it is designed to remedy; and whether or not public or private rights are unnecessarily or unjustly invaded...” *McCarthy v Madden* (1914) 33 NZLR 1251 at p 1269; *JB International Ltd v Auckland City Council* [2006] NZRMA 401 at para [56]; *Harrison v Auckland City Council* [2008] NZHC 553 at para [51]. See also *Carter Holt Harvey Limited v North Shore City Council* [2006] 2 NZLR 787 at para [99], where Asher J referred to the need for a qualitative assessment, “by balancing the benefit of a bylaw against the nature of its interference with the public right”. Such exercise involves an “element of subjectivity”. “A cautious approach can be discerned in relation to administrative law attacks on Council decisions generally: *Wellington City Council v Woolworths New Zealand Ltd* (No 2) [1996] 2 NZLR 537 (CA) at p 546.”



The rationale of all such rules lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear. Thus, the rationale of the presumption against the modification or abolition of fundamental rights or principles is to be found in the assumption that it is ‘in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.’”<sup>1018</sup>

Gleeson CJ has described the presumption against parliamentary intention to infringe on common law rights as “a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted.” He added, “[t]he hypothesis is an aspect of the rule of law.”<sup>1019</sup> Lord Hoffmann refers to the presumption as an aspect of a ‘principle of legality’ governing the relationship between parliament, the executive and the courts. In *R v Secretary of State for the Home Department; Ex parte Simms*, Lord Hoffmann explained: “[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”<sup>1020</sup>

The Supreme Court of Canada, in *R v Greenbaum*, whilst recognizing the benevolent rule of construction of local government powers, nonetheless clearly viewed a by-law’s purported

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<sup>1018</sup> [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18, citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; and *Ex parte Walsh and Johnson, In re Yates* [1925] HCA 53, (1925) 37 CLR 36 at p 93.

<sup>1019</sup> *Electrolux Home Products Pty Ltd v The Australian Workers’ Union* [2004] HCA 40, (2004) 221 CLR 309 at 329.

<sup>1020</sup> [1999] UKHL 33, [2000] 2 AC 115 at p 131.

alteration of common law rights as requiring the court to use a stricter rule of construction.

The Supreme Court of Canada observed that:

“As Davies J wrote in his reasons in *City of Hamilton v Hamilton Distillery Co* [1907] SCC 1, (1907) 38 SCR 239 at p 249, with respect to construing provincial legislation enabling municipal by-laws: ‘In interpreting this legislation I would not desire to apply the technical or strict canons of construction sometimes applied to legislation authorizing taxation. I think the sections are, considering the subject matter and the intention obviously in view, entitled to a broad and reasonable if not, as Lord Chief Justice Russell said in *Kruse v Johnson* [[1898] 2 QB 91] at p 99, a ‘benevolent construction’, and if the language used fell short of expressly conferring the powers claimed, but did confer them by a fair and reasonable implication I would not hesitate to adopt the construction sanctioned by the implication.’

Accordingly, a court should look to the purpose and wording of the provincial enabling legislation when deciding whether or not a municipality has been empowered to pass a certain by-law. [But] [a]s Ian Rogers has noted in *The Law of Canadian Municipal Corporations* (2nd edn 1971), at p 388, a somewhat stricter rule of construction than that suggested above by Davies J is in order where the municipality is attempting to use a power which restricts common law or civil rights... [C]ourts must be vigilant in ensuring that municipalities do not impinge upon the civil or common law rights of citizens in passing *ultra vires* by-laws (see, eg, *Merritt v City of Toronto* (1895) 22 OAR 205 at p 207).”<sup>1021</sup>

There is abundant precedent requiring a court to construe a Local Government Act as lacking any grant power to license the staging of publicly exhibited sporting events at public places such as roads, beaches, parks, village or town greens, or commons, unless there is

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<sup>1021</sup> [1993] SCC 166, [1993] 1 SCR 674 at pp 687-88 (Iacobucci J). In *R v Greenbaum*, the Supreme Court of Canada favoured restricting a municipality’s jurisdiction to those powers expressly conferred upon it by the legislature. The Court noted that a purposive interpretation should be used in determining what the scope of those powers are.

clear and unambiguous language in the legislative enactment granting a local government such clear power. Local Government Acts must use irresistibly clear language unmistakably devolving power to local authorities to alter the common law through granting licenses to stage publicly exhibited sporting events which infringe on common law public rights. Local Government Acts, in Australia at least, do not use clear and unambiguous language in reference to a local governments care and management responsibilities in respect of public land and parkland.

Whilst the sports events using public roads may be tolerated, or even encouraged and facilitated, by a local or municipal council, such local authority has no power at law to negate or to authorize the commission of a common law crime – a public nuisance. This was made clear in *Johnson v City of New York*,<sup>1022</sup> *Attorney-General v Blackpool Corporation*,<sup>1023</sup> and *State of New York v Waterloo Stock Car Raceway Inc.*<sup>1024</sup> Acquiescence by a local authority in the staging of the events, and the use of public beaches, parks, and highways in the staging of the events, is not sufficient in law to disqualify public nuisance and legitimate the use of public spaces for an exclusive private activity or for a private pecuniary purpose.<sup>1025</sup> Whilst local councils possess powers to close roads for maintenance, consistent with their responsibilities to care for and manage local public roads,<sup>1026</sup> it is doubted that this power extends to creating a public nuisance by granting exclusive license to a sports promoter, such as Crossport Management and Marketing Pty Ltd (ABN 670 5234 2239), trading as USM Events, which organises, promotes, and stages the disparate sporting events of the Noosa Triathlon, the Mooloolaba Triathlon, the Gold Coast Half Ironman Triathlon, the Queensland Triathlon Series, the National Road Cycling Championships, the Noosa Blue Water Swim (a two kilometre ocean swim), the River Run (a ten kilometre run about the streets of Brisbane), and the Queensland Run Series. The fact that the triathlon races at the seaside towns of

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<sup>1022</sup> 186 NY 139, 78 NE 715, Court of Appeals of New York (1906).

<sup>1023</sup> (1907) 71 JP 478.

<sup>1024</sup> 96 Misc 2d 350 (1978) at p 358, citing *Little Joseph Realty v Town of Babylon* 41 NY 2d 738, Court of Appeals of New York (1977).

<sup>1025</sup> This was the express opinion of the Court of Appeal of New York in *Johnson v City of New York* 186 NY 139 (1906), where the Court held that a permit of the aldermen of the borough where the motorcar race was staged, authorising the sponsors of the motorcar race, the Automobile Club of America, to conduct the race about the public streets of New York, was not sufficient authority in law. Because the motorcar race used the public highway for private use, thereby creating an illegal interference with the rights of the public to travel on the public streets, what was required was a statutory power. (Chief Justice Cullen at p 147).

<sup>1026</sup> See eg s 60 Local Government Act 2009 (Qld).

Noosa and Mooloolaba are very popular, attracting some 3,000 competitors each and some 10,000 spectators; and the fact that the races may be good for tourism and for the local economy; are not relevant factors in the determination that the appropriation of a public highway for the exclusive use of a triathlon race – to say nothing of the appropriation of public parks and the inconvenience caused by crowds, the installation of temporary marquees and stands, and the annoyance and discomfort to local resident created by loud music loudspeakers and commentary – is a public nuisance. As was highlighted by Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms*, there is too great a risk that a purported claim to possess power to override the common law may have passed unnoticed in the democratic process.<sup>1027</sup> The general words of a Local Government Act will not be found by the courts to uphold the exercise of a purported power of a local authority to alter or infringe upon public rights at common law. The supreme legislature must use express language to devolve such power to a subordinate body.

## 5. The nature and extent of power devolved under Local Government Acts

The fundamental question to assess in respect of the sufficiency of any purported license given by a local authority to a sports organisation to stage a sporting event at a public place is to assess whether the legislation empowering the local authority properly devolves a power to local authorities to alter common law public rights through the granting of a license to stage publicly exhibited sporting events at public places.

Sports events using public highways, beaches, parks, or other public places are generally held with the approval of local authorities and purport to be lawfully conducted according to such approval. The Noosa Triathlon, for example, obtains approval from the Sunshine Coast Regional Council.<sup>1028</sup> The Sunshine Coast Regional Council believe themselves to have the

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<sup>1027</sup> [1999] UKHL 33, [2000] 2 AC 115 at p 131.

<sup>1028</sup> Consequent to council amalgamation legislation in Queensland, the Noosa Shire Council is now merged with the Maroochydore Shire Council and the Caloundra Shire Council to form the Sunshine Coast Shire Council. Pursuant to regs 20-21 Local Government Reform Implementation (Transferring Areas) Regulation 2007 (Qld) and regs 12-13 Local Government Reform Implementation Regulation 2008 (Qld) the local laws of the Noosa Shire Council continue to operate until 31 December 2010 upon the amalgamation of Noosa Shire Council with Sunshine Coast Regional Council.

power to approve events such as the Noosa Triathlon, pursuant to their own local laws, even though the race amounts to a public nuisance at common law as being an obstruction or interference of the public highway, public canal, public beach and public park, for the exclusive use of the promoters, organisers, and competitors in the race. Just how, as a matter of law, the local authority believes its own local by-laws take precedence over common law rights in the absence of clear legislative language granting local authorities power to alter common law rights is bewildering.

The power of local authorities in Queensland to issue local laws is provided by sections 9 and 28 of the Local Government Act 2009 (Qld), formerly section 26 of the Local Government Act 1993 (Qld). This provision states that a local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area. Powers which a local council in the state of Queensland may exercise in respect of public places such as roads, canals and beaches, are now dispersed between section 60 of the Local Government Act 2009 (Qld), regulations 20 and 23-26 of the Local Government (Operations) Regulations 2010 (Qld), and section 30 of the Land Act 1994 (Qld). All powers are to be exercised in a manner consistent with the fundamental nature of a local council as having care and management responsibilities in respect of the public places within their jurisdiction.<sup>1029</sup> With respect to roads, section 60(1) gives local authorities ‘control’ over all roads in its area. By section 60(2) control of roads is defined as including the following types of actions: (i) the survey and resurvey of roads; (ii) the construction, maintenance and improvement of roads; (iii) regulation of the use of roads; and (iv) regulation of the movement of traffic and parking vehicles on roads. In no sense does this grant of power to a local authority entitle a local authority to grant an exclusive right to a sporting association to possession of a public road in order to conduct a publicly exhibited sporting event on a road within its jurisdiction. Such a license facilitates the creation of a

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<sup>1029</sup> Pursuant to s 7 Local Government Act 1993 (NSW) councils exist, “to provide goods, services and facilities, and to carry out activities, appropriate to the current and future needs of local communities and of the wider public; to administer some regulatory systems under this Act; and to manage, improve and develop the resources of their areas.” See also s 30(b)(ii) of the Land Act 1994 (Qld) which provides for powers and responsibilities in respect of public places such as parks and reserves in Queensland provides that all powers must be exercised to, “ensure that reserves and land granted in trust are properly and effectively managed in a way that is consistent with the purpose for which the reserve was dedicated...” and further, following s 30(c), power is to be exercised to, “ensure that the community purpose for which the reserve was dedicated or the land was granted in trust is not diminished by granting inappropriate interests over the reserve or land...”

public nuisance at common law. Section 69 gives power to local authorities to close a road during a temporary obstruction to traffic or if it is necessary or desirable to close the road for a temporary purpose; or in the interests of public safety. Yet even this power, which on its face may seem quite extensive and may justify the temporary closing of a road during the staging of a publicly exhibited sporting event, must be read in the context of section 60(2) and the other provisions of the Act. A temporary obstruction means exactly what it says – temporary. At common law, temporary means momentary, brief, fleeting, transitory, transient. Common law dictum dictates that a temporary obstruction must occur with promptness.<sup>1030</sup> Any obstruction of the highway that is not prompt is a public nuisance because such obstruction impinges upon the fundamental common law public right of way. A local council is not empowered under section 69 to license an act which threatens a public nuisance at common law. A temporary closure of a road under section 69 must be done in order to effect performance of a local government’s powers to ‘survey and resurvey’ roads, or undertake the ‘construction, maintenance and improvement of roads’, or to ‘regulate’ the use of roads. What we are saying, in effect, is that a local government license to a sporting association to stage a publicly exhibited sporting event on a road is beyond the enumerated powers in section 60 and 69 of the Local Government Act 2009 (Qld) and is *ultra vires*.

The term ‘regulate’ as used in local government enabling legislation has been much discussed by the courts. Dixon J declared in *Swan Hill Corporation v Bradbury*,<sup>1031</sup> that a power to make by-laws regulating a subject matter does not extend to prohibiting it, either altogether or subject to a discretionary licence or consent. Referring to the word ‘regulate’ and the definition of that word in its legal context as used in the Local Government Act 1915 (Vic) whereby a power to regulate was devolved to local governments, Dixon J stated:

“...the force of the word ‘regulating’ has been discussed repeatedly and the cases dealing with its application have grown only too familiar. Prima facie a power to make by-laws regulating a subject matter does not extend to prohibiting it either altogether or subject to a discretionary licence or consent. By-laws made under such a power may prescribe

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<sup>1030</sup> In *R v Jones* 3 Camp 230 Lord Ellenborough referred to the need for acts in the public highways to “be done with promptness.” Followed in *Barber v Penley* [1893] 2 Ch 447 at p 450.

<sup>1031</sup> [1937] HCA 15, (1937) 56 CLR 746 at p 762 (Dixon J).

time, place, manner and circumstance and they may impose conditions, but under the prima facie meaning of the word they must stop short of preventing or suppressing the thing or course of conduct to be regulated.’’<sup>1032</sup>

As with his opinion in *Williams v Melbourne Corporation*,<sup>1033</sup> Justice Dixon again here referred to local government acts of suppression of conduct as being beyond the power of local government. Local governments may not, by discretionary license or by consent, such as may occur in relation to the staging of publicly exhibited sporting events, prevent or suppress public rights of use of public roads, and other public places. Legislation does not permit local governments to so do and the courts will not interpret the legislative provisions devolving regulating power to local governments as encompassing acts of suppression or prohibition.

In the earlier case of *Melbourne Corporation v Barry*,<sup>1034</sup> the High Court held that a section of the Local Government Act 1915 (Vic) which authorised a council to make by-laws for the purpose of regulating traffic could not support a by-law which provided that any procession of persons or vehicles (except for military or funeral purposes) required the prior consent in writing of the council. Isaacs J said that the effect of the by-law was that all processions (except military and funeral processions) were absolutely prohibited, no matter what their nature or effect on traffic, unless the Council chose, for any reason it liked, to permit a

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<sup>1032</sup> *ibid* at p 762, citing *Municipal Corporation of City of Toronto v Virgo* (1896) AC 88; *Attorney-General for Ontario v Attorney-General for Canada* (1896) AC 348; *Londonderry Harbour Commissioners v Londonderry Bridge Commissioners* (1894) 2 IR 384 at pp 390, 391; *Co-operative Brick Co Pty Ltd v City of Hawthorn* [1909] HCA 56, (1909) 9 CLR 301; *Shire of Tungamah v Merrett* [1912] HCA 63, (1912) 15 CLR 407 at pp 423, 424; *Metropolitan Meat Industry Board v Finlayson* [1916] HCA 77, (1916) 22 CLR 340 at p 348; *Melbourne Corporation v Barry* [1922] HCA 56, (1922) 31 CLR 174; *Williams v Melbourne Corporation* [1933] HCA 56, (1933) 49 CLR 142 at pp 148-149, 155-156, 157-158, 159; *British Trawlers Federation Ltd v London and North Eastern Railway Co* (1933) 2 KB 14 at bottom of p 32 and bottom of p 33; *Fox v Allchurch* (1926) SASR 384 at pp 387, 388; *Kerridge v Girling-Butcher* (1933) NZLR 646 at pp 690, 691 (Smith J). See also *Shanahan v Scott* [1957] HCA 4, (1957) 96 CLR 245 at p 253 (Dixon CJ, Williams, Webb and Fullagar JJ); *Lyster v Camberwell City Council* (1989) 69 LGRA 250 at p 258 (Cummins J); *Morton v Union Steamship Co of New Zealand* [1951] HCA 42, (1951) 83 CLR 402; and *Ira, L & LC Berk Ltd v Commonwealth* (1930) 30 SR (NSW) 119. *Swan Hill Corporation v Bradbury* [1937] HCA 15, (1937) 56 CLR 746 at p 752 (Latham CJ), at p 762 (Dixon J) was cited and followed in *Herald & Weekly Times Limited v VCAT* [2005] VSC 44 at paras [15]-[16]; and *Mineralogy Pty Ltd v Body Corporate for the 'The Lakes Coolum'* [2002] QCA 550 at paras [7]-[8].

<sup>1033</sup> [1933] HCA 56, (1933) 49 CLR 142 at p 156 (Dixon J).

<sup>1034</sup> [1922] HCA 56, (1922) 31 CLR 174.

particular procession.<sup>1035</sup> This is similar to how local councils frame their by-laws in respect of parks and reserves in some areas of Queensland. The *Sunshine Coast Regional Council (Noosa Shire Council) Local Law No 5 – Parks, Reserves and Foreshores* provides that: “A person shall not in any park without the written approval of the Council except at places set apart therefor, organise or play a game, the playing of which requires the exclusion from the playing space of all persons other than those engaged in that game.”<sup>1036</sup> And further, ““The Council may close all or any portion or portions of any park set aside for particular games during such times as it thinks fit...”<sup>1037</sup> In the *Barry* case, Isaacs J considered that by-laws such as these were framed exactly as if the word prohibition were used in the sub-section instead of the word regulating. He regarded that as a fundamental error which could not be justified by the statute authorising the by-law. Both Isaacs and Higgins JJ agreed that the by-law in the *Barry* case was invalid as it had the effect of allowing the council “to make its own unfettered and unregulated will at the moment the test of legality or illegality.”<sup>1038</sup> In the *Municipal Corporation of City of Toronto v Virgo*,<sup>1039</sup> a decision which was cited in each of the above-mentioned High Court of Australia judgments, the Judicial Committee of the Privy Council said at page 93:

“It appears to their Lordships that the real question is whether under a power to pass by-laws ‘for regulating and governing hawkers, etc. the council may prohibit hawkers from plying their trade at all in a substantial and important portion of the city no question of any apprehended nuisance being raised.’... No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is a marked distinction to be drawn between the prohibition

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<sup>1035</sup> *ibid* at p 197.

<sup>1036</sup> Reg 24(2) *Sunshine Coast Regional Council (Noosa Shire Council) Local Law No 5 – Parks and Reserves and Foreshores*. A ‘park’ is defined to mean “any public place, open space, garden, recreation ground, reserve, common, foreshore, esplanade, or any land in the area dedicated to or vested in or under the control or management of the Council,... and includes ‘canals’ within the meaning of the Canals Act 1958-1987.”

<sup>1037</sup> Reg 25(1) *Sunshine Coast Regional Council (Noosa Shire Council) Local Law No 5 – Parks and Reserves and Foreshores*.

<sup>1038</sup> [1922] HCA 56, (1922) 31 CLR 174 at p 197.

<sup>1039</sup> (1896) AC 88 (Privy Council).



or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shews that when the Legislature intended to give power to prevent or prohibit it did so by express words..."<sup>1040</sup>

In *Attorney-General for Ontario v Attorney-General for the Dominion* it was said that: "A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation."<sup>1041</sup> Dixon J said the same thing in *Williams v Melbourne Corporation*:

"The purpose of the power is regulation, and this Court has insisted upon the limited nature of a power to regulate traffic (*Melbourne Corporation v Barry*). As I understand it, that decision, when applied to traffic... construes the power as enabling the council to prohibit passage through the streets only in so far as the council may reasonably consider necessary or conducive to the safe, orderly, commodious and proper use of them by the heterogeneous components of 'traffic' who are making an otherwise lawful use of them considered as highways. The decision applied the doctrine 'that a power to regulate implies the continued existence of the thing to be regulated, and that a power to regulate a subject does not authorize the donee of the power to prohibit the subject matter'. But this doctrine does not altogether exclude the prohibition of particular acts or things... The nature, operation, and apparent purpose of the restraints imposed must be considered and, if they **fairly** answer the description of a regulation of the subject matter, the power will sustain them."<sup>1042</sup>

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<sup>1040</sup> *Virgo* was cited and followed by the Privy Council in *Ng Enterprises Ltd v The Urban Council (Hong Kong)* [1996] UKPC 30 at paras [18]-[19], and by the Supreme Court of Canada in *Prince George (City of) v Payne* [1978] 1 SCR 458 at p 468.

<sup>1041</sup> [1896] AC 348 at p 363, cited in *Ng Enterprises Ltd v The Urban Council (Hong Kong)* [1996] UKPC 30 at paras [18]-[19].

<sup>1042</sup> [1933] HCA 56, (1933) 49 CLR 142 at pp 155-56, citing *Melbourne Corporation v Barry* [1922] HCA 56, (1922) 31 CLR 174 at p 211 (Higgins J), emphasis added.

Other cases suggest that a power to ‘regulate’ may connote a power to prohibit acts to a limited degree, subject always to the interpretation of the nature and extent of the purported local government power within the context of the legislation devolving power to local governments by the courts. Noting Justice Dixon’s view in *Swan Hill Corporation v Bradbury*, Justice Starke observed in *Brunswick Corporation v Stewart*: “Prima facie a power to regulate and restrain a subject matter does not authorize prohibiting it altogether or subject to a discretionary licence or consent... But, as might have been expected, this proposition cannot be universally applied (*Slattery v Naylor* (1888) 13 App Cas 446).”<sup>1043</sup> In *Mineralogy Pty Ltd v Body Corporate for ‘The Lakes Coolum’*, the Court of Appeal of Queensland cited *Swan Hill Corporation* and *Brunswick Corporation v Stewart* and stated:

“The underlying rationale [behind these decisions] is that a power to regulate an activity implies that the activity will, despite such regulation, be capable of continuing, which it would not do if it were completely prohibited. See *City of Toronto v Virgo* [1896] AC 88, 93. Prohibition of an activity in part, in a particular case, or in a particular way, may however in some circumstances be needed in order to achieve effective regulation. ‘The extent to which such partial prohibition is permissible’ the Privy Council has said, ‘depends on the terms of the power to regulate and on the context in which the power is to be operated’: *Ng Enterprises Ltd v Urban Council* [1997] AC 168, 177. The Australian authorities, a few of which are referred to in that decision are in accord with that view... In *Brunswick Corporation v Stewart* [1941] HCA 7, (1941) 65 CLR 88, 95, Starke J said that the court ‘should have regard to the body entrusted with the power and the language in which the power is expressed and the subject matter with which the body has to deal’...”<sup>1044</sup>

A discretionary power to grant a license or permit does not connote a power to prohibit. When considering the nature and extent of the granting of permits or licenses in respect of public places such as parks and reserves under the Land Act 1994 (Qld), for example, local

<sup>1043</sup> [1941] HCA 7, (1941) 65 CLR 88 at p 95.

<sup>1044</sup> [2002] QCA 550 at para [8].

councils must be aware that their powers to grant a lease, license or permit in respect of parks does not connote an unfettered power to prohibit conduct at parks at their discretion. Any power to prohibit conduct at a public place must not be exercised so as to abrogate rights. Young CJ, in *Strathfield Municipal Council v Poynting*,<sup>1045</sup> in the Court of Appeal of New South Wales, clarified the nature and extent of a local government power to ‘regulate’ in the following fashion:

“Depending on the words of the grant of power, the cases drew a stark distinction between giving power to a statutory body to regulate a trade and a power to prohibit. Thus a by-law excluding chapmen from the busiest streets in Toronto was held to be a prohibition and outside a power to regulate chapmen; see *Toronto MC v Virgo* [1896] AC 88. A power to regulate ordinarily does not permit prohibition subject to a discretionary power to licence or permit; see eg *Swan Hill SC v Bradbury* [1937] HCA 15, (1937) 56 CLR 746. These cases show the primal dichotomy.

However, it was always recognized under this line of case that to an extent, the power to regulate enabled the authority to impose some prohibitions. Thus, had the council in *Virgo* merely prohibited, for instance, trade outside the main railway station, the by-law may have survived. Thus, Isaacs J said in *Tungamah SC v Merrett* [1912] HCA 63, (1912) 15 CLR 407, ‘Regulation may include prohibition. It depends on what is to be regulated. The regulation of subject matter involves the continued existence of that subject matter, but is not inconsistent with an entire prohibition of some of its occasional incidents.’”

By-laws such as regulations 24(2) and 25(1) of the *Sunshine Coast Regional Council (Noosa Shire Council) Local Law No 5 – Parks, Reserves and Foreshores*, referred to above, may be ultra vires. The facts of the cases where courts have commented on the nature and extent of the term ‘regulate’ as used in local government enabling legislation concern local government prohibitions of conduct which likely threaten a public nuisance, in that, absent the local

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<sup>1045</sup> [2001] NSWCA 270 at paras [127]-[129].

government imposed restraint the conduct will likely cause an obstruction or inconvenience to others. Local governments, in prohibiting conduct which likely threatens a public nuisance, are acting in concert with the common law. The situation in respect of local government licenses of publicly exhibited sporting events is very different. Far from prohibiting conduct which likely threatens a public nuisance, such local government license actually facilitates the commission of a public nuisance and prohibits the public from exercising their public rights. The decisions of *Tungamah SC v Merrett*,<sup>1046</sup> *Brunswick Corporation v Stewart*,<sup>1047</sup> *Williams v Melbourne Corporation*,<sup>1048</sup> *Mineralogy Pty Ltd v Body Corporate for the 'The Lakes Coolum'*,<sup>1049</sup> and *Strathfield Municipal Council v Poynting*,<sup>1050</sup> where the courts held that local government power to regulate may include a power to prohibit, in a limited degree, must be understood in this context. This is probably what Dixon J had in mind when he said in *Williams v Melbourne Corporation* that: “The nature, operation, and apparent purpose of the restraints imposed must be considered and, if they **fairly** answer the description of a regulation of the subject matter, the power will sustain them.”

The effect of *Swan Hill Corporation* and alike dictum, is that a court would be unlikely to find that a power to regulate the use of roads, and a power to regulate the use of bathing reserves and the foreshore, under the Local Government Act 2009 (Qld), includes a power to exclude the public from the use of public places during the staging of a publicly exhibited sporting event at such public places. The term ‘regulate’ as used in sections 60(2)(e) of the Local Government Act 1993 (Qld), for example, and the phrase that a local government may make a local law “for the good rule” of its local area does not connote a power to prohibit the public from the use of roads, beaches, bathing reserves, and the foreshore. Nor does such power to regulate connote a power to suppress such use. The public maintain public rights of use in respect of such public places and all local government power must be exercised in such a way to ensure the continuance of such public rights. The term ‘regulate’ must be strictly interpreted by the courts and must not be understood to connote a power to alter the

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<sup>1046</sup> [1912] HCA 63, (1912) 15 CLR 407.

<sup>1047</sup> [1941] HCA 7, (1941) 65 CLR 88 at p 95 (Starke J).

<sup>1048</sup> [1933] HCA 56, (1933) 49 CLR 142.

<sup>1049</sup> [2002] QCA 550 at paras [7]-[8].

<sup>1050</sup> [2001] NSWCA 270 at paras [127]-[129] (Young CJ).

common law or alter common law public rights: *Bropho v Western Australia*,<sup>1051</sup> *R v Greenbaum*.<sup>1052</sup> Parliament must use clear language if it wishes for local government to possess such power: *R v Secretary of State for the Home Department; Ex parte Simms*.<sup>1053</sup>

In the Australian state of New South Wales, local authority powers in respect of roads is limited entirely to the carrying out of road works and to otherwise maintain and improve roads (sections 71 and 91-102 Roads Act 1993 (NSW)); and a power to regulate traffic in connection with road works (see sections 115 and section 122 Roads Act 1993 (NSW), which grants power to regulate traffic for a temporary purpose, and a power to direct the removal of obstructions of roads, and section 116).<sup>1054</sup> The term ‘regulating traffic’ is understood, following the dicta of *Swann Hill Corporation* and like cases, as a limited power. Section 144 provides a power to grant a permit for a road event: “A roads authority may grant a permit to any person to conduct a road event on a public road.”<sup>1055</sup> A ‘road event’ is defined to mean a speed contest or such other activity as may be prescribed by the regulations for the purposes of this definition. Regulation 21A of the Roads Regulation 2008 (NSW) provides that “a filming project (within the meaning of the Local Government Act 1993), and any activity that is ancillary to or connected with such a filming project, is prescribed as a road event.” No other classification or further definition of road event is enumerated. A publicly exhibited sporting event is presumed to not be a road event because the legislation does not state so in clear unambiguous language: *Potter v Minahan*,<sup>1056</sup> *R v Secretary of State for the Home Department; Ex parte Simms*.<sup>1057</sup> The power under section 144 does not permit a local authority to license an act which amounts to a public nuisance at common law. A court of law construing the meaning of section 144 would be unlikely to hold that section 144 provides power to alter the common law public right of way on the highway

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<sup>1051</sup> [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18, citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; and *Ex parte Walsh and Johnson, In re Yates* [1925] HCA 53, (1925) 37 CLR 36 at p 93.

<sup>1052</sup> [1993] SCC 166, [1993] 1 SCR 674 at pp 687-88 (Iacobucci J).

<sup>1053</sup> [1999] UKHL 33, [2000] 2 AC 115 at p 131.

<sup>1054</sup> Presumably, a local government in the state of New South Wales may use its powers under s 125 Local Government Act 1993 (NSW) to abate such obstruction on grounds of public nuisance.

<sup>1055</sup> A Local Council in New South Wales is the roads authority for all public roads within its Local Government area, except for any freeway, Crown public road, or any public road declared to be under the control of some other authority, eg the Sydney Harbour Foreshore Authority. Public roads are vested in fee simple in the Local Councils. See s 145(3) Roads Act 1993 (NSW).

<sup>1056</sup> [1908] HCA 63, (1908) 7 CLR 277 at p 304.

<sup>1057</sup> [1999] UKHL 33, [2000] 2 AC 115 at p 131.

without the supreme legislature using express and unambiguous words in section 144 providing a local authority with power to grant an exclusive right to persons to close a road for the staging of a sporting event. The power granted by section 144 must be read to be consistent with the common law and to preserve the common law public right of way: *Bropho v Western Australia*,<sup>1058</sup> *R v Greenbaum*.<sup>1059</sup>

Local Councils are similarly limited in the nature and extent of their powers in respect of other public places such as beaches, parks and commons, and not only in respect of roads. Section 28 of the Local Government Act 2009 (Qld), couple with regulation 24 of the Local Government (Operations) Regulation 2010 (Qld) empowers local authorities with care and management and regulation responsibilities in respect of canals in its area. There is no mention of a power for a local authority to close a canal to public use so that the canal might be used exclusively by the promoters of the Noosa Triathlon. Regulations 25 and 26 of the Local Government (Operations) Regulation 2010 (Qld) stipulate that a local government will have control of bathing reserves and the foreshore where such places have been placed under their control by the Governor-in-Council. Section 28 of the Act provides that a local authority may make local laws in respect of such places. There is no power given to a local authority to close a beach to the public for the exclusive use of a sports promoter or to otherwise create or contribute to the creation of a public nuisance by obstructing or interfering with public rights to use of and enjoyment of a beach, seashore, or foreshore. Prior to the repeal of the Local Government Act 1993 (Qld), local government powers in respect of bathing reserves and the foreshore were contained in sections 935 and 936 of that Act. Those sections specifically used the words, “the local government may manage and regulate the use of” the foreshore or bathing reserve. Following the decisions in *Swan Hill Corporation* and *Williams v Melbourne Corporation*, for example, the word ‘regulate’ as used in sections 935 and 936 must not be understood to empower a local council to prohibit the public from using the beach, foreshore and seashore, during the staging of the publicly exhibited sporting event or for any other purpose. Because the staging of a publicly exhibited sporting event such as a surfing competition or a triathlon impinges upon public

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<sup>1058</sup> [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18, citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; and *Ex parte Walsh and Johnson, In re Yates* [1925] HCA 53, (1925) 37 CLR 36 at p 93.

<sup>1059</sup> [1993] SCC 166, [1993] 1 SCR 674 at pp 687-88 (Iacobucci J).

rights of recreation in the sea and at the beach, the courts must, following *Bropho v Western Australia*,<sup>1060</sup> and *Ex parte Simms*,<sup>1061</sup> for example, hold that a local government does not have power under the Local Government Act to abrogate these common law public rights. The words in sections 935 and 936 of the repealed Act and in section 28 of the Local Government Act 2009 (Qld) are not irresistibly clear in providing local governments powers to abrogate common law rights.

There is no provision in the Local Government Act 2009 (Qld) granting power to a local authority to license the exclusive use of a park by the promoter of a publicly exhibited sporting event to the detriment of the public exercising public rights of use of parks. In Queensland, local authorities are merely trustees of land which is set aside for parks and gardens or for use for sport or recreation. Parks are created, pursuant to the Land Act 1994 (Qld), following a dedication of land to the public to be held in trust for the public. Trustees of this land are often the local government, but can also be groups such as a showgrounds trust or an incorporated sporting association. Trustees are responsible for managing the land subject to the provisions of the Land Act 1994 (Qld). Pursuant to section 52, all power to be exercised by trustees is confined to ‘management and maintenance of a reserve’. All action, including the making of by-laws, must be consistent with the purposes for which the reserve was dedicated. Section 57 empowers a local authority with rights to lease public land such as parks; but, following section 52(2), all leases must be consistent with the purposes for which the reserve was dedicated, and all leases must be approved by the Crown. Section 60 empowers a local authority with rights to grant a permit in respect of public lands; but again, such permit must be consistent with the purposes of the land (s 60(2)). A member of the public has the right to use trust land for the purpose for which it was set aside.<sup>1062</sup> Whilst the precise details of this use may be governed by by-laws which may limit the time or manner of use in the interests of safety,<sup>1063</sup> a trustee has no power to exclude the public from

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<sup>1060</sup> [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18, citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; and *Ex parte Walsh and Johnson, In re Yates* [1925] HCA 53, (1925) 37 CLR 36 at p 93.

<sup>1061</sup> [1999] UKHL 33, [2000] 2 AC 115 at p 131.

<sup>1062</sup> See *R v Doncaster Metropolitan Borough Council ex parte Braim* The Times 11 October 1986; *Gibbs v Village of Grand Bend* [1995] 129 DLR (4th) 449 (Ontario Court of Appeal); and *North Cronulla Precinct Committee Inc v Sutherland Shire Council* [1999] NSWCA 438 (3 December 1999) (Court of Appeal for New South Wales). See further the discussion in Chapter 12, above.

<sup>1063</sup> For example, by-laws may prohibit playing golf on a reserve in the interests of the safety of people using it for walking.

use of a park by granting exclusive possession and thereby impinging on the public's common law right of use. Section 61(3) of the Land Act makes this very clear: "It is a condition of every trustee lease, sublease and trustee permit that the lessee, sublessee or permittee holds the lease, sublease or permit so that the land may be used for the purpose for which it was reserved or granted in trust without undue interruption or obstruction." Lessees or permit holders of parks and reserves have only very limited rights; a member of the public retains their right to walk their dog on leased trust land, though they do not have the right to enter a building constructed on that land. Local authorities or trustees with management and care responsibilities over public places may be duty bound, under some legislative enactments, to protect public rights relating to recreation and use of public parks<sup>1064</sup>

Despite the absence of statutory power to license sports events which create public nuisances by obstructing public rights to use of and enjoyment of the public highways and other public places, local authorities purport to exercise power which interferes with or obstructs public rights, pursuant to their own local laws. Looking at just two local councils, the local councils where the Noosa Triathlon and the Gold Coast Triathlon take place, reveals the extent of this claim to power. Pursuant to regulation 24(2) *Sunshine Coast Regional Council (Noosa Shire Council) Local Law No 5 – Parks, Reserves and Foreshores* the local council purports to exercise a power which might create a public nuisance by obstructing public rights to recreation. Regulation 24(2) provides: "A person shall not in any park without the written approval of the Council except at places set apart therefor, organise or play a game, the playing of which requires the exclusion from the playing space of all persons other than those engaged in that game."<sup>1065</sup> Further, under regulation 24(4), it is provided that: "The Council may set apart a portion of a park for the purpose of a lawful game or sport and from time to time may grant permission to a club or association of clubs, upon such terms and

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<sup>1064</sup> Pursuant to s 8 *Centennial Park and Moore Park Trust Act 1983 (NSW)*, the corporation that is established by the Act must "maintain the right of the public to the use of the Trust lands [the parks]." The corporation managing the parks is under a duty not to enable the use of the parks for events which attract crowds of 20,000 of more persons (s 20A). The act is silent on the issue of public nuisance.

<sup>1065</sup> Under reg 2 *Sunshine Coast Regional Council (Noosa Shire Council) Local Law No 5 – Parks, Reserves and Foreshores*, the term 'park' is defined to include "any public place, open space, garden, recreation ground, reserve, common, foreshore, esplanade, or any land in the area dedicated to or vested in or under the control or management of the Council, or of which the Council is trustee, or in respect of which the Council is empowered to make local laws or any part thereof and includes 'canals'..."



conditions as the Council may think fit, to use such portion so set apart...” And, further, under rule 25(1), the Council empowers itself with what appears to be an arbitrary power of determining which games or sports may be lawfully played in a public place: “The Council may close all or any portion or portions of any park set aside for particular games during such times as it thinks fit...” By these by-laws it would appear that the Sunshine Coast Regional Council claims a power to appropriate, or to facilitate the appropriation of, the whole of, or a part of, a public place for use by a private entity thereby excluding the public from the use of the place. This conduct amounts to a public nuisance at common law because public rights of use may be arbitrarily infringed. It is doubted that a local council has the power at law to create such a common law public nuisance. The statutes which grants local authorities the power to care, manage and regulate public places, such as beaches and parks – section 28 of the Local Government Act 2009 (Qld) coupled with regulations 25 and 26 of the Local Government (Operations) Regulation 2010 (Qld), and section 52 of the Land Act 1994 (Qld) – do not empower a local authority to lease or license public land to private entities or private associations, for a fee, in order to obstruct public rights of use of and enjoyment of the public place. All leases and licenses given must enhance the purposes for which the public place is dedicated to public use, not diminish: section 30(c) of the Land Act 1994 (Qld).<sup>1066</sup>

Pursuant to regulation 8 of the *Sunshine Coast Regional Council (Noosa Shire Council) Local Law No 4 – Bathing Reserves*, the Sunshine Coast Regional Council purports to possess power to temporarily set apart the whole or a part of a beach for (i) life-saving competitions or training, and for (ii) other aquatic activities. Council also purports to possess power to impose restrictions on access to the area set apart for beach sporting events (regulation 8(1)(b)) and to fine people \$1,000.00 for contravening such restrictions (regulation 8(3)).<sup>1067</sup> The local council claims to possess such power to fine even though the public using a public beach have a common law public right to use of the beach for their recreation; even though section 28 of the Local Government Act 1993 (Qld), coupled with regulation 25 of the Local

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<sup>1066</sup> Section 30(c) provides that trustees of public reserves must, “ensure that the community purpose for which the reserve was dedicated or the land was granted in trust is not diminished by granting inappropriate interests over the reserve or land granted in trust.”

<sup>1067</sup> The regulation imposes a fine of 10 penalty units which, pursuant to s 5(1)(b) Penalties and Sentences Act 1992 (Qld).

Government (Operations) Regulation 2010 (Qld), does not grant a power to the local council to exclude the public from using beaches; and even though the local council may as a matter of law be committing a common law public nuisance by excluding the public from using the beach or a part of the beach during a beach sporting event. Following the decisions in *Bropho v Western Australia*,<sup>1068</sup> and *Ex parte Simms*,<sup>1069</sup> a court will construe the Local Government Act 2009 (Qld) very strictly because the power which the Sunshine Coast Regional Council purports to exercise under regulation 8 of their Local Law No 4 infringes common law rights. A court would not be likely to construe the Local Government Act as granting such extensive power to the Sunshine Coast Regional Council because the Act is not irresistibly clear in its language.

Alike the Noosa Shire Council, where the Noosa Triathlon is staged, the Gold Coast City Council, where the Gold Coast Marathon is staged, purports to exercise, pursuant to its own local laws, powers to exclude the public from public reserves and parks and grant exclusive licenses to sports associations for the use of either all or part of a public park. Regulation 17(1) of the *Gold Coast City Council Local Law No 9 (Parks and Reserves)* provides:

“A local government may grant a licence conferring rights of occupation and use of a specified part of a park or reserve.

*Examples—*

*A licence might, for example, authorize a sporting association to—*

- *mark out a playing field in a specified location on the park or reserve;*
- *install specified equipment and facilities (such as goal posts and change rooms);*
- *exclude the public from the relevant part of the park or reserve either temporarily (eg during the playing of a game) or over the whole of the period of the licence.”*

It is unlikely that the Gold Coast City Council has authority to ‘exclude the public’ from a public park, despite its claim of power to so do. The Land Act 1993 (Qld) does not grant such broad power to the Gold Coast City Council. Furthermore, section 61(3) provides that any license must not obstruct or interrupt the public in the enjoyment of a park or a reserve

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<sup>1068</sup> [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18, citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; and *Ex parte Walsh and Johnson, In re Yates* [1925] HCA 53, (1925) 37 CLR 36 at p 93.

<sup>1069</sup> [1999] UKHL 33, [2000] 2 AC 115 at p 131.

where that park or reserve is dedicated to public use. The effect of the decision in *Melbourne Corporation v Barry*,<sup>1070</sup> is that local government by-laws cannot require written approval for use of public spaces. The primary responsibility on a local council in respect of public land such as parks, or commons, is to manage and maintain such places. The local authority in such circumstances does not have a right the same as a private owner of land. As was stated by the Privy Council in *Attorney-General for the Province of Quebec v Attorney-General for the Dominion of Canada*: "...a declaration that lands are 'vested' in a public body for public purposes may pass only such powers of control and management and such proprietary interest as may be necessary to enable that body to discharge its public functions effectively."<sup>1071</sup> This does not enable a local authority under whose management public places are vested to create or contribute to the creation of a public nuisance at common law by closing roads, beaches, or parks for the exclusive use of a private entity such as a sports association, sports club, or sports promoter. As was discussed in Chapter 3 of this thesis, the dedication of land to the public for recreation creates a public right to use of that land for recreation. Any act, such as the staging of a publicly exhibited sporting event, which affects or infringes upon the public's common law right to use of the land is a public nuisance. Excluding the public and thereby preventing the public from exercising their public right to use of the park for recreation is a common law public nuisance.

The term 'regulate' is not used in the Land Act 1994 (Qld); and the term 'manage' must necessarily connote a power of lesser extent than the term 'regulate'. Councils do not have regulatory powers under the Land Act and, consequently, have no power to prohibit conduct in respect of a park which has been dedicated to the public for public use in Queensland. The granting of a lease or license in respect of public land such as parks or commons, under the Land Act, must be consistent with the purposes for which the public place was dedicated to the public. There is no power given to local governments under the Land Act to 'exclude the public' either temporarily or permanently from using public parks and other public spaces. Any act by a local council to exclude the public from use of public places, thereby infringing public rights of use of public spaces so dedicated to the public, may be a common law offence known as a public nuisance. No local council in Queensland has authority

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<sup>1070</sup> [1922] HCA 56, (1922) 31 CLR 174.

<sup>1071</sup> [1921] 1 AC 401 (Privy Council) at p 409.

devolved to them from Parliament to license or pardon the commission of a common law public nuisance because the Act of Parliament which entrusts the care and management responsibilities on local council's in the state of Queensland is makes no mention of granting such power to local authorities and is otherwise silent on the issue of public rights and common law public nuisance. Case law dictates that Parliament must use irresistibly clear language in the Land Act if Parliament wishes to devolve to local governments powers to alter fundamental common law public rights.

In New South Wales, local government powers in respect of land are classified as non-regulatory (Chapter 6), regulatory (Chapter 7) or ancillary (Chapter 8). Where land is classified as community land, which ordinarily comprises land such as a public park,<sup>1072</sup> that is, where land is used for public recreative purposes, amongst others, a local government's powers are confined to those which promote only enumerated core objectives under the Act. For example, pursuant to section 36F, "The core objectives for management of community land categorized as a sportsground are: (a) to encourage, promote and facilitate recreational pursuits in the community involving organized and informal sporting activities and games, and; (b) to ensure that such activities are managed having regard to any adverse impact on nearby residences." Similarly, section 36G provides: "The core objectives for management of community land categorized as a park are: (a) to encourage, promote and facilitate recreational, cultural, social and educational pastimes and activities, and (b) to provide for passive recreational activities or pastimes and for the casual playing of games..." Councils may grant a lease in respect of community land such as parks pursuant to section 45(2) Local Government Act 1993 (NSW); but only for purposes of public recreation or "the physical, cultural, social and intellectual welfare or development of persons" (s 46(4)(a)), or to further the core objective of its categorization (s 46(2)).

The case of *Seaton v Mosman Municipal Council*,<sup>1073</sup> underscores a fine distinction in respect of local government powers in which the reader is encouraged to consider. In *Seaton*, the New South Wales Court of Appeal held, dismissing the appeal, that the authority of a council to grant a lease of community land under the Local Government Act 1993 (NSW) empowers it

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<sup>1072</sup> See Note at c 6, pt 2 Local Government Act 1993 (NSW).

<sup>1073</sup> [1998] NSWSC 75.

to restrict the public right of access to it, provided that such lease is not manifestly inconsistent with the use of the community land. In so holding, the court followed *Friends of Pryor Park Inc v Ryde City Council*.<sup>1074</sup> The fine distinction respecting local government power which this decision underscores is the distinction between local government power to grant a lease of public land for a certain purpose such as a golf links or a zoo, pursuant to the legislative schemes of the Local Government Act 1993 (NSW) or the Land Act 1994 (Qld), on the one hand, and a purported local government power to deal arbitrarily with public land where the public have already established a common law public right to use of the land, on the other. Whilst a local council may have power to regulate the use which the public make of a park or of a part of a park which has been set aside as a golf course consequent to a lease to a private entity or a sports association, in the interests of safety and the conservation of land, it is doubted that a local council has power to exclude the public from using a park consequent to the grant of a license to a private entity or a sports association for exclusive occupation of a park or of a part of a park which is already in use by the public for their recreation. In the latter circumstance, the public possesses a common law public right to use of the park, and local councils lack a clearly defined power under the statutes to unilaterally abrogate. Legislative enactments will be carefully construed by the courts to determine the exact nature and extent of any power devolved to a local authority.

In *Seaton*, Mason P noted:

“In *Friends of Pryor Park Inc v Ryde City Council* (1996) 91 LGERA 302 the Court of Appeal discussed Chapter 6, Pt2 of the 1993 Act (ss 25-54). The court rejected the argument that it was beyond the power of a council to grant a lease over all or part of community land. The legislative scheme was found to have displaced the earlier law represented by *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54; *Storey v North Sydney Municipal Council* (1970) 123 CLR 574 and *Waverley Municipal Council v Attorney General* (1979) 40 LGRA 419. These cases stood for the proposition that land used for public recreation and enjoyment must be open to the public generally as of right. In the lastmentioned case, Hope JA had said (at 428) that: ‘except in so far as

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<sup>1074</sup> (1996) 91 LGERA 302.

the statute otherwise provides, the Council has no power to erect upon the park any buildings which are not for the purpose of the use of the land as a public park or for public recreation.’

Following this case, the Local Government Act 1919 was amended so as to permit the alienation of public reserves, subject to procedures for public notice, public objections and ministerial approval. *Friends of Pryor Park* held that the 1993 Act carried forward such a legislative scheme. Subject to compliance with its provisions, s 36 and s 46 in particular, a council was held authorised to grant a lease of community land. Such a transaction is necessarily capable of restricting the public right of access which had been previously stipulated as unfettered by the trilogy of cases to which reference has been made.”

Mason P, in the context of the present controversy, noted also the comments of Gleeson CJ (with whose reasons Mahoney P and Meagher JA agreed) in *Friends of Pryor Park* ((1996) 91 LGRA at 314): “We are not concerned with whether it was wise of the New South Wales Parliament to enact a law giving councils such power, or whether it would be wise of the Ryde Council to use the power in the intended manner. Those are political, not legal, questions. The grant of a lease or licence over a public reserve, in a manner which excludes the general public, will often raise sensitive social and political issues. However, the legislation clearly contemplates that such a grant may be made, and the form of accountability which it provides is primarily political. Provided they are acting within the law, and in conformity with their legal obligations, it is for elected councillors, not judges, to make decisions about the use and management of community land, including public reserves.”

Both *Seaton* and *Friends of Pryor Park* concerned the proposed leasing of a public building on public land to a private entity to conduct a business. In *Seaton* the local council sought to grant a right of exclusive possession by lease of ‘The Bathing Pavilion’ at Balmoral Beach, a facilities building built in 1928, to an entity who would operate a restaurant. In *Friends of Pryor Park*, part of Pryor Park was to be used by scouts/guides groups and

childcare/preschool organizations. Gleeson CJ said of Pryor Park: “Pryor Park was categorized as natural area, bushland and watercourse, by a plan of management which acknowledged the presence of the scout hall. To permit the use, for a period, of part of the park, including the scout hall, for a Montessori preschool, will not have such an effect on the remainder of the park as to destroy the appropriateness of the general categorization as bushland... and watercourse.”<sup>1075</sup> Neither case concerned the appropriation of public land beyond the reconversion and reuse of an existing building standing on that public land. It could not be argued in either case the public rights of use of the park were arbitrarily infringed by the appropriations.

Both *Seaton* and *Friends of Pryor Park* hold that the legislative scheme for the granting of leases or licenses in respect of public land such as parks must be complied with, section 46 of the Local Government Act 1993 (NSW) in particular, in order to show that a local government power is *intra vires*. Section 46 provides that leases or licenses can **only** be granted by a local council where the purpose for which it is granted is consistent with the objectives for which the land is dedicated to the public.<sup>1076</sup> A lease or license is only lawfully granted where the specific purpose of the lease or license encourages, promotes and facilitates recreational, cultural, social and educational pastimes and activities, or provides for passive recreational activities or pastimes and for the casual playing of games at a place categorized as a park; or where the lease or license encourages, promotes and facilitates recreational pursuits in the community involving organised and informal sporting activities and games at a place categorized as a ‘sportsground’. The Act also envisions, separately, the construction of public facilities and refreshment facilities as within the power of a local government.<sup>1077</sup> A

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<sup>1075</sup> (1996) 91 LGERA 302 at p 316.

<sup>1076</sup> See s46(2) Local Government Act 1993 (NSW). Other purposes for which a lease or license may be given under s 46 include for the provision of public utilities, pipes, conduits or other connections under the surface of the ground; the provision of goods, services and facilities; the physical, cultural, social and intellectual welfare or development of persons (including, maternity welfare centres, infant welfare centres, kindergartens, nurseries, child care centres, family day-care centres, surf life saving clubs, restaurants or refreshment kiosks); a filming project; or for camping grounds or caravan parks prescribed by regulations. Leases or licenses in respect of the foreshore (where many beach related publicly exhibited sporting events are staged) are more severely limited than those at a park and do not include recreation as a purpose justifying a lease or license. Thus, section 36N provides: “The core objectives for management of community land categorized as foreshore are: (a) to maintain the foreshore as a transition area between the aquatic and the terrestrial environment, and to protect and enhance all functions associated with the foreshore’s role as a transition area, and (b) to facilitate the ecologically sustainable use of the foreshore, and to mitigate impact on the foreshore by community use.”

<sup>1077</sup> See s 46(5) Local Government Act 1993 (NSW).

local council in New South Wales does not appear to possess a power to grant a lease or license in respect of parks, beaches or the foreshore, in order to limit or diminish the recreational pursuits of the public at such public places. In interpreting the extent of local government power under section 46 of the Local Government Act, a court will have regard for the spirit of the statute and the purposes of the land over which a local government exercises power.<sup>1078</sup> Where land is dedicated to the public, it becomes public land. A local council is not in the position of a private landowner in respect of such land. They must deal with the land only in such manner as is consistent with the purposes of the dedication, preserving the manner of use of the land.<sup>1079</sup> The common law public right to recreation is an important common law principle which a court might cite in its assessment of the nature and extent of local government power under section 46 Local Government Act. A publicly exhibited sporting event may diminish the recreational pursuits of the public at public places such as parks because such event obstructs or inconveniences the public in their use of the park for their own recreation. The principles at the heart of the dictum in *Storey v North Sydney Municipal Council*,<sup>1080</sup> and *Waverley Municipal Council v Attorney General*,<sup>1081</sup> may still provide a relevant benchmark against which courts can assess the true nature and extent of local government powers under section 46. In *Storey* the High Court was concerned with the interpretation of a restrictive covenant which prevented the council from using the park in question otherwise than as a ‘public reserve’ as defined by the Local Government Act 1919

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<sup>1078</sup> In *Church of the Holy Trinity v United States*, 143 US 457 (1892) at p 459, the United States Supreme Court noted that: “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in the statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such a broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.” Similarly, Roscoe Pound wrote that: “...[W]hen... primary indices to the meaning and intention of the lawmaker fail to lead to a satisfactory result, and recourse must be had to the reason and spirit of the rule, or to the intrinsic merit of the several possible interpretations, the line between a genuine ascertaining of the meaning of the law, and the making over of the law under the guise of interpretation, becomes more difficult. Strictly, both are means of genuine interpretation. They are not covers for the making of new law. They are modes of arriving at the real intent of the maker of existing law.” (Roscoe Pound ‘Spurious Interpretation’ (1907) 1 *Columbia Law Review* 379 at pp 383–384).

<sup>1079</sup> As the Privy Council noted in *Attorney-General for Ontario v Attorney-General for the Dominion* [1896] AC 348 at p 363, cited in *Ng Enterprises Ltd v The Urban Council (Hong Kong)* [1996] UKPC 30 at paras [18]–[19]: “A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation.” See also *Williams v Melbourne Corporation* [1933] HCA 56, (1933) 49 CLR 142 at pp 155–56 (Dixon J)

<sup>1080</sup> (1970) 123 CLR 574.

<sup>1081</sup> (1979) 40 LGRA 419.



(NSW). Owen J held that the grant of a lease over part of the land to the Boy Scouts' Association was a breach of the restrictive covenant. He stated at page 579: "To grant the proposed lease would result in the total exclusion from the land leased of all members of the public other than those who are members of the Boy Scouts' Association. I do not think that, in the circumstances, it could properly be said that the land was being used for the purpose of 'public recreation, enjoyment or other public purpose of that nature.' It would not be, in the relevant sense, open to the public generally as of right, to use the words of Windeyer J in *Randwick Corporation v Rutledge*."

In *Australian Posters Pty Ltd v Leichhardt Council*, the court, citing *Storey*, opined that the phrase "public recreation" as used in Local Government Acts in respect of public land meant that such land had to be "open to the public generally as of right".<sup>1082</sup> Any lease or license in respect of parks or reserves which are used for "public recreation" must maintain the public's right to use of the park or reserve. Any exercise of power to grant a lease or license which threatens to infringe common law public rights must be found only in clear and unambiguous language in the Local Government Act. A court will construe the ambit of section 46 very narrowly where common law public rights are jeopardized: *Bropho v Western Australia*,<sup>1083</sup> and *Ex parte Simms*.<sup>1084</sup>

Common law courts have never interpreted statutorily devolved local government powers as encompassing the power to license the commission of a public nuisance through staging a publicly exhibited sporting event: *Johnson v City of New York*,<sup>1085</sup> *Attorney-General v Blackpool Corporation*,<sup>1086</sup> and *State of New York v Waterloo Stock Car Raceway Inc.*<sup>1087</sup> In both *Johnson* and *Blackpool Corporation* the courts interpreted the local government powers in a limited fashion, holding that the exercise of power must be in accord with existing law, both statutory laws and the common law.

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<sup>1082</sup> [2000] NSWLEC 195 at paras [34] and [36].

<sup>1083</sup> [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18, citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; and *Ex parte Walsh and Johnson, In re Yates* [1925] HCA 53, (1925) 37 CLR 36 at p 93.

<sup>1084</sup> [1999] UKHL 33, [2000] 2 AC 115 at p 131.

<sup>1085</sup> 186 NY 139, 78 NE 715, Court of Appeals of New York (1906).

<sup>1086</sup> (1907) 71 JP 478.

<sup>1087</sup> 96 Misc 2d 350 (1978) at p 358, citing *Little Joseph Realty v Town of Babylon* 41 NY 2d 738, Court of Appeals of New York (1977).

In *Attorney-General v Blackpool Corporation*, suit was brought by the Attorney-General, at the relation of a ratepayer, for an injunction to restrain the local authority from organizing or promoting motor races on the sea front. The Attorney-General argued that the parade was a highway, and that racing upon it was an improper use at common law. It was also a breach of the Motor Car Act 1903 (UK), because the cars necessarily exceeded the speed limit. The parade was also a footway, and the running of motor cars on it was an offence against the Highway Act 1835. The erection of barricades caused obstruction, and constituted a nuisance at common law, as well as an offence against the Highway Act. And the collection of crowds and of motor cars waiting to start on the carriage-drive was also a nuisance which ought to be restrained. In defence to the action the local authority argued that: "Some latitude must be given to the corporation to allow its use for events causing public enjoyment, just as cricketers are allowed temporarily to monopolies portions of public parks. Section 44 of the Public Health Acts Amendment Act 1890 expressly authorizes the closing of parks and recreation grounds for purposes of this kind... The powers of the corporation are, of course, not unlimited, but this use is within them as being a bona fide use of a public work for a public purpose, viz the creation of an attraction in the off-season, and the advertisement of Blackpool." Likely, it would be to these policy matters which a contemporary local council would appeal in an attempt to justify their purported power to license a public sporting event such as a triathlons or a marathon which uses the highway.

Heard before the Lancaster County Palatine Chancery Court, Vice-Chancellor Leigh Clare found that the Blackpool local government took an active part in the promotion of the motor race: "They did in fact issue notices closing a portion of the parade and tramway to the public. They put up barriers and a grand stand, and the receipts of the grand stand were received by the corporation. The effect of what the corporation did was to exclude the public from the use of the parade for any purpose during certain hours on certain days, and to stop the tramway service during substantially the same periods. It was charged by the plaintiff that the motor meeting was a great nuisance and caused crowds to assemble and generally to block the access from the town of Blackpool to the seashore. I heard the evidence given on this point, and I am satisfied that there was no greater interference with the public rights than was inevitable if the corporation were authorized to do the acts which they did in furtherance of the meeting." The critical factor in the case was to determine the

extent of the local authorities powers to license the motor race. “What I have to determine” Leigh Clare VC said “is whether the corporation were actually within their powers in what they did, or whether they were not.” Was there an Act of Parliament which permitted the local authority to alter the common law by license and promote an act which was a public nuisance at common law? The Vice-Chancellor held that the corporation were in the position of trustees of the parade for limited public purposes, namely, for the purpose of use by foot passengers, perambulators, invalid carriages, and similar vehicles, and that it was an abuse of the parade to allow it to be used for either horses or motor cars, and a fortiori motor races. The court found that the local authority had no right to exclude legitimate users of the tramway and parade in or that illegitimate users may have exclusive possession of it during certain hours.<sup>1088</sup>

Just as the Crown may not dispense with the law by a previous license; nor may a local authority dispense with the law by any previous license. If a publicly exhibited sporting event threatens a public nuisance on the ground that it might impinge upon a public right, no prior license of either the Crown or of a local authority will make such event lawful or pardon the perpetrators of the public nuisance at common law. Even if a local authority has the care and management of the public space where the publicly exhibited sporting event is staged – such as a public beach or public park – this administrative responsibility does not operate as a power to license or pardon an act which is a common law offence. The New South Wales Court of Appeal has stated on more than one occasion that the right of a council to exercise care, control and management of land might better be described as a responsibility or even a liability, than as an interest having a commercial value.<sup>1089</sup> The exercise of a purported power to grant rights of exclusive possession of public places to promoters of sporting events, by local authorities, is **arbitrary** and ultra vires Local Government Acts and Land Acts.

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<sup>1088</sup> *ibid* at p 480.

<sup>1089</sup> *Hornsby Council v Roads and Traffic Authority of New South Wales* (1997) 41 NSWLR 151 at p 153A-D (Mason P); *Sydney Harbour Foreshore Authority v Walker Corporation Pty Ltd* [2005] NSWCA 251 at para [96]. See also *Western Australia v Ward* [2002] HCA 28 at para [214] ff, (2003) 213 CLR 1.

## 6. A local authority may be complicit in committing a public nuisance offence

Absent a clear and unambiguous grant of a power from Parliament, a local council has no power to grant permits or otherwise license a public sporting event that either causes or threatens to cause a public nuisance by impinging on public rights. A local council may itself be liable to prosecution or to abatement of a public nuisance at the suit of the Attorney-General where that council facilitates a public nuisance by granting a license to a sports promoter to stage a sporting event which causes obstruction, interference or discomfort to the public in the exercise of their rights; by closing public highways or public places; or by otherwise granting license to a sporting event which causes obstruction, interference, discomfort or annoyance to the public by drawing crowds of spectators. This was the holding in *Johnson v City of New York*,<sup>1090</sup> where the Court of Appeals of New York noted that a local authority's permit to the Automobile Association of America to allow a car race to take place in the streets of New York was not sufficient at law to authorise the race. The local authority's power was not sufficient because there was no **statutory power** to grant a permit to use the highway for a private purpose. This was, similarly, the holding in *Blackpool Corporation*. A local authority found complicit in the commission of a common law public nuisance would be liable at common law to unlimited fines, to an injunction to abate the nuisance, and to damages.

## 7. Concluding remarks

The legislature must be much clearer in respect of the powers exercisable over public places and public highways, particularly the staging of sporting events in public places and public highways. At issue for the legislature in any grant of power is the interference with and obstruction of public rights to use of and enjoyment of public places for physical activity and recreation. If public places are to be divvied up among disparate private sporting clubs or sporting associations, each of which demand membership fees and fees for use of sports grounds under their management, then there is no place for the public to exercise their

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<sup>1090</sup> *Johnson v City of New York* 186 NY 139, 78 NE 715 (1906) at p 146 of the former report.

natural right to physical exercise or sport without paying any fee. Only express statutory provisions will obviate arbitrary exercise of power. The Executive Government, as *parens patriae* and protector of public wellbeing and public rights, has responsibility to manage the present situation; to take action, at common law, against local authorities exercising arbitrary power which interferes with or obstructs public rights.

The Local Government Acts granting care and management responsibilities for public spaces such as beaches and parks to local authorities do not authorize the licensing, by local authorities, of activities such as publicly exhibited sporting events which give rise to public nuisances at common law. The only authority which will shelter an actual common law public nuisance is an express, and not an implied, legislative provision. As was stated by the Court of Appeals of New York in *Hill v City of New York*, “The authority which will thus shelter an actual nuisance must be express... For, consider what the proposition is. It upholds a positive damage to the citizen and denies him any remedy... Surely, an authority which so results should be remarkably strong and clear.”<sup>1091</sup>

There are very real legal and practical limitations on local government care and management responsibilities over public places entrusted to them. Any act by a local council which might see the appropriation of a public place, such as a park or a beach or a public highway, for **exclusive** use by a private entity for a private purpose, and thereby causing an obstruction or interference with public rights to use of and enjoyment of the public place, is a public nuisance.<sup>1092</sup> A local authority has **no power** to license or pardon the creation of a public nuisance by causing a public right to be obstructed, absent a specific grant of power from the legislature concerning the specific act which may create or contribute to a public nuisance. There is no express statutory power in Queensland or New South Wales, for example, enabling acts which amount to public nuisances at common law to be carried out on public places. It is doubted, further, that a local council possess any implied power to act in a way which creates or contributes to a common law public nuisance by obstructing or interfering with public rights. Only Parliament may authorize a public nuisance by effecting a change to the common law through legislative enactment.

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<sup>1091</sup> 139 NY 495, 34 NE 1090 at p 1092 (1893).

<sup>1092</sup> See discussion in Part 2 of this thesis, above.

Indeed, far from Local Government Acts granting any power to local authorities to license the commission of public nuisances, Local Government Acts invariably restrict the powers to local authorities to only promulgate by-laws to protect the public from public nuisances. Note, for example, the power in s 125 of the Local Government Act 1993 (NSW) in New South Wales giving power to local governments to abate public nuisances, and section 145 of the Local Government Act 2002 (NZ) which provides that local authorities in New Zealand may only make by-laws for the purpose of (a) protecting the public from nuisance; (b) protecting, promoting, and maintaining public health and safety; or (c) minimizing the potential for offensive behaviour in public places.

In understanding the nature and effect of proscriptions on publicly exhibited sporting events, on ground of public nuisance, it is important to note the limits of a local authority's powers. With respect to the Noosa Triathlon, and other sporting events held in and about the Noosa Shire, which use public roads, public parks, and public beaches, the Sunshine Coast Regional Council has no power under statute or at common law to authorise an event which is a breach of the common law. Only Parliament, in this case the Queensland Parliament, has sovereignty to alter the common law of the State of Queensland. The doctrine of parliamentary sovereignty, and the principles of statutory interpretation which will construe grants of power narrowly where common law rights are in issue, apply. Local Councils have responsibility to manage public places within their area only unless an express grant of power in clear and unambiguous terms is granted.

## Chapter 15

### The role of the Crown in managing public exhibitions of sport

The Crown has a pivotal role to play in ameliorating the conflict of rights which the common law offence of public nuisance as applied to publicly exhibited sports highlights. Three interconnected principles underline the importance of the Crown's role and suggest that the Crown **must** be concerned in safeguarding public rights. These principles, assessed in this chapter, may be stated thus: (i) the common law constitutional principle of the Royal Peace or public peace; (ii) the common law constitutional principle of *parens patriae*; and (iii) jurisprudential exegesis on the relations between public rights, the people, and their government.

#### 1. Why is the Crown involved in the resolution of a conflict of rights in sports?

Perhaps many governments are unaware of their authority, or their duty, respecting publicly exhibited sports events staged at public places. In *R v Jones*, Lord Hoffmann stated: "Often the reason why the sovereign power will not intervene is because it takes the view that the threatened action is not a crime. In such a case too, the citizen is not entitled to take the law into his own hands. The rule of law requires that disputes over whether action is lawful should be resolved by the courts."<sup>1093</sup> Yet, ignorance of the law is no defence.<sup>1094</sup> It is no

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<sup>1093</sup> [2006] UKHL 16 at para [84].

<sup>1094</sup> It is a principle of common law that, generally speaking, ignorance of the law is no defence to a criminal charge: *ignorantia juris non excusat*. The general principle and its effect is referred to by Lord Bridge of Harwich in *Grant v Borg* [1982] 1 WLR 638 at p 646, where his Lordship described the principle as 'fundamental': "First, the principle that ignorance of the law is no defence in crime is so fundamental that to construe the word 'knowingly' in a criminal statute as requiring not merely knowledge of the facts material to the offender's guilt, but also knowledge of the relevant law, would be revolutionary and, to my mind, wholly unacceptable." In

defence to the infractor of the criminal law; and should likewise be no defence for Crown inaction. Nor does any absence of knowledge of the applicability of the common law offence of public nuisance to publicly exhibited sporting events affect the existence of relator or ex officio actions to prevent the staging of public sporting events which infringe public rights. The Crown and the courts have an important function to perform, to ensure that the common law is preserved and that, where there remain gaps in the legislative agenda of Parliament, justice is administered fairly in a balanced and mindful manner. The Crown is involved because it **has** to be involved. If the Crown is not involved then the staging of publicly exhibited sports events is arbitrary and capricious, and public rights are subject, on a cynical view, to the financial motivations or needs of local councils endeavouring to balance their modest budgets and of sporting federations desiring maximum publicity. Considerations of impingement of public rights and impacts on the environment, and assessments of the proper use of public spaces, are not considerations which are wholly and consistently recognised or applied by the local council exercising a fictitious, and perhaps spurious, power to license publicly exhibited sports. The Executive ought to provide leadership in the management of the interrelationship between the private citizen and publicly exhibited sports.

In suggesting that the Executive has a pivotal role to play in the management of competing rights between the private citizen and profit-motivated professional sports organisations at public places, I am not suggesting that there is a radical step to take. There are two reasons why such this suggestion is not radical. Firstly, there is considerable historical precedent to support the suggestion that the Executive has been a player in the regulation of sport through exercising constitutional powers and through convention. This fact is explored in

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*Gilmore v Poole-Blunden* [1999] SASC 186 at para [7], the Supreme Court of South Australia said, after consideration of Lord Bridge's comments in *Grant v Borg*, that the principle, "...will apply to total ignorance of the law. It will apply to a mistaken understanding of the law and to a situation where the defendant has been positively misled as to the effect of the law. A positive but wrong belief as to the state of the law will be no excuse: *R v Kennedy* [1923] SASR 183. The principle covers a wide variety of circumstances in which ignorance of the law will not afford a defence. Mistake as to the law is only one of them." The maxim *ignorantia juris non excusat* was explained by Sir William Evans in *Pothier's Treatise on the law of Obligations* [Sir William Evans (ed) GF Le Trosne (tr) *Pothier's Treatise on the law of Obligations* (Butterworths London 1806) (British Library Shelfmarks 10659.c.10, 496.e.16), cited in *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349 at p 464 (Lord Goff of Chieveley). He stated, at pp 394-395: "The rule in its terms is sufficiently satisfied, by holding that no man shall, under the pretence of an ignorance of the law, excuse himself from the performance of his own obligations, or acquire an advantage, or avoid a detriment, when he has omitted using the means ordained by law for those purposes."



Chapter 2, at the beginning to this thesis, wherein historical edicts and regulations are detailed. Secondly, there is at least one jurisdiction where the Executive arm of government **is** authorized by statute to license public sporting events and, in that process, authorized to also determine that some sporting events are not lawfully practised in public places. This jurisdiction is France. This fact is explored in Chapter 16, following, wherein legislative reform is promoted.

However, the basic fact remains that if the Crown does not sue to protect public rights then there is no remedy for the people and publicly exhibited sporting events may continue to be arbitrarily staged to the detriment of the public right of way, the public right of quietude, the public right to safety, and the public right to recreation, &c.

Whether any conduct on the part of a sports club, association, competition or event amounts to a public nuisance is a question of fact. The case law as discussed in this thesis provides a guide as to the degree to which the Executive ought to manage, either through their Sports Minister or through their Attorney-General, the competing interest which arise in the staging of public sporting events. This case law demonstrates two very important factors: namely, that,

- (i) the Executive of Government has a crucial role in managing the staging of sports in public places and has a responsibility, as *parens patriae*, to establish policy as to the manner in which public sporting events may be staged at public places to minimize or avoid infringements of public rights; and
- (ii) the people ought to be aware of their right to petition the Attorney-General for relator actions for abatement of public sporting events as public nuisances. In light of this, the public ought to be made aware, and the Executive Government ought also to be cognisant of the fact, that as few as seven households may satisfy the class of the public whose rights are interfered with by a public nuisance. Principally what the Crown is doing in suing for abatement of a sporting event as a public nuisance is protecting the more important public right which the staging of the sporting event is said to impinge.

## 2. The Royal Peace

In *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority*,<sup>1095</sup> the Court of Appeal examined the interaction between known prerogative powers and prerogative powers that might exist. The facts concerned the Home Secretary's power to issue baton rounds to a chief constable without the consent of the police authority. The court held that the 1964 Police Act gave the Home Secretary the power to do this but went on to hold that in any event the Crown had a prerogative power to keep the peace within the realm, which was not displaced by the 1964 Act, and the Home Secretary could therefore have acted even if the Act had not provided him with one. Nourse LJ commented that "the scarcity of references in the books to the prerogative of keeping the peace within the realm does not disprove that it exists. Rather it may point to an unspoken assumption that it does"

The constitutional notion of the Queen's Peace is the plinth for all human interactions within our common law legal systems. The peace of our Sovereign Lady the Queen is an all-embracing atmosphere in our law.<sup>1096</sup> "[T]his notion of the King's Peace, extended, elaborated and even a little fantasicated [over the centuries], has coloured with one hue or another the whole field of our law, civil as well as criminal."<sup>1097</sup> In Pollock and Maitland's *The History of English Law* it is noted that, "all criminal offences have long been said to be committed against the King's Peace."<sup>1098</sup> 'All criminal offences' includes the common law offence of public nuisance. Conduct which might be regarded as a threat to the Royal Peace, or, as would be more commonly noted now, to society, is regarded by the common law as unlawful.<sup>1099</sup>

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<sup>1095</sup> [1989] 1 QB 26 (Court of Appeal).

<sup>1096</sup> Sir Carleton Kemp Allen *The Queen's Peace* (Stevens and Sons London 1953) citing *Maitland*, at p 3. Sir Frederick Pollock and FW Maitland *The History of the English Law* (Cambridge University Press Cambridge 1895) vol 2, at p 462, note that: "The King's Peace at first only extended to crimes which were the original pleas of the Crown but the King's Peace by an easy process extended itself until it had become an all embracing atmosphere." See also *R v Magee* (1923) 40 CCC 10 at p 12 (Sask Court of Appeal) (Haultain CJS, Lamont, McKay and Martin JJA concurring).

<sup>1097</sup> *ibid* at p 35.

<sup>1098</sup> Sir Frederick Pollock and FW Maitland *The History of the English Law* (Cambridge University Press Cambridge 1895) vol 1, at p 22.

<sup>1099</sup> See *R v Doot* [1973] AC 807 at pp 817-818 (Lord Wilberforce).

The Royal Peace is intrinsically linked to the constitutional notion of *parens patriae*. The Royal Peace emanated from the constitutions of the Anglo-Saxon kingdoms of Britain, before the Conquest, at a time when there was not yet any established comprehensive peace of the whole realm. The King's Peace is coupled with the concept of kingly jurisdiction over the laws, particularly by way of appeal to the King. The King's residual benevolence encompassed the principle that the King was the general patron and protector of the peace, a principle that later came to be known as *parens patriae*. In *VIII Aethelred 33* we find: "If any attempt is made to deprive in any wise a man in orders, or a stranger, of either his goods or his life, the king shall act as his kinsman and protector (*for maeg and for mundboran*), unless he has some other."<sup>1100</sup> The Royal Peace is thus a protective jurisdiction, as is *parens patriae*. This law of Aethelred was re-enacted by Cnut (*II Cnut 40*).<sup>1101</sup>

William I confirmed the constitutional notion of the King's peace on the Conquest. William I provided special protection for **his** followers. In the third of the *The Articles of William I*, circa 1068, it is provided that: "all the men whom I brought with me or who have come after me shall be in my peace and quiet."<sup>1102</sup> Preserving the public peace have long been responsibilities of the Crown. This legal fact was commended in the recent judgment of the Supreme Court of Canada, in *R v Kerr*,<sup>1103</sup> where Justices Bastarache and Major, for the majority, and Justice Binnie, dissenting, commented on the magnitude of the Queen's Peace as it related to an offence under the Criminal Code of Canada of possessing a weapon 'for a purpose dangerous to the public peace.' "The foundational notion of the 'public peace'," Justice Binnie remarked, "reaches back to the roots of Anglo-Canadian history prior to the Norman Conquest: A self-respecting Anglo-Saxon king would always try to bring order and tranquillity to his people, and in Ethelbert's laws there was already one principle by which kings could extend their influence. That was the principle of the *peace*. The mitigation of the disastrous effects of 'self-help' was attained by the extension of the idea of the king's peace and the responsibility of all, not just of the parties to a quarrel, to see that it was

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<sup>1100</sup> FL Attenborough (ed)(tr) *The Laws of the Earliest English Kings* (Cambridge University Press Cambridge 1922) at pp 108-09.

<sup>1101</sup> *ibid*.

<sup>1102</sup> See Sir Carleton Kemp Allen *The Queen's Peace* (Stevens and Sons London 1953) at pp 8-11 and 23-25.

<sup>1103</sup> [2004] SCC 44, [2004] 2 SCR 371, (2004) 240 DLR(4<sup>th</sup>) 257 (Supreme Court of Canada).

observed”<sup>1104</sup> The Royal Peace is “the legal name of the normal state of society”; and is “the general peace and order of the realm, as provided by law”.<sup>1105</sup>

Considerations of public order that arise from the staging of public sports are reflected in the common law principle that sporting events which occur in public at public places fall squarely within the police or supervisory power of the state.<sup>1106</sup> In *State v Hogleiver*,<sup>1107</sup> the question on appeal was whether a statute which prohibited the playing of baseball on Sundays where any fee was charged, or where any reward, or prize, or profit, or article of value was depending upon the result of such game, was unconstitutional. Argument was made that the State violated organic law by prohibiting baseball on a Sunday because the statute discriminated against baseball playing as an occupation. The Supreme Court was concerned that unrestrained public exhibitions of sports *can* lead to regrettable behaviour and regrettable harm. In upholding the statute, the Supreme Court of Indiana noted that publicly exhibited sports, such as a game of baseball, were rightfully controllable by police power owing to tendency of such games to breaches of the peace. Justice Dowling stated:

“The State deals with [sport] in the exercise of its police power, to circumscribe certain evils which are likely to result from its unrestrained practice, to repress certain known pernicious tendencies, and to protect the citizens of the State...

The objects of the game of baseball, as stated in the brief of counsel for the appellee, are to furnish entertainment and amusement to the spectators of the sport. It is said to be popular. It attracts great throngs, including persons of all ages and of both sexes. Both chance and skill enter into the doubtful results of the game. It affords the opportunity, and furnishes strong inducements to that species of gambling known as ‘betting.’ The contests between the players are often close and exciting,

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<sup>1104</sup> *R v Kerr v The Queen* [2004] SCC 44 at para [63], [2004] 2 SCR 371, (2004) 240 DLR(4th) 257 (Supreme Court of Canada) (Binnie J, dissenting, citing A Harding *A Social History of English Law* (Penguin Books Harmondsworth Middlesex 1966) at pp 15-21).

<sup>1105</sup> Sir James F Stephen *History of the Criminal Law* (Routledge London 1996) vol 1, p 185; *R v Magee* (1923) 40 CCC 10 (Sask CA) at pp 11-12 (Haultain CJS); Sir James AH Murray *New English Dictionary* (Clarendon Press Oxford 1933) vol 7, p 582; and *R v Kerr* [2004] SCC 44 at para [66], [2004] 2 SCR 371, (2004) 240 DLR(4th) 257.

<sup>1106</sup> *State v Hogleiver* 152 Ind 652 (1899).

<sup>1107</sup> 152 Ind 652, 53 NE 921 (1899).

and the decisions of umpires unsatisfactory. Tumults, riots, and breaches of the peace at the games, are not uncommon.

Wherever these conditions exist, the peace and quiet of neighbourhoods are liable to be disturbed, and the public order broken. Under such circumstances, it follows that extraordinary police regulation and supervision become necessary, and, this being the case, these exhibitions fall, unquestionably, within the class of entertainments and occupations which, in the legitimate exercise of the police power of the State, may be regulated, restrained, or even prohibited by the people...<sup>1108</sup>

Publicly exhibited sporting events occur within the Royal Peace. The Crown possesses an enveloping jurisdiction in order to ensure the peace and good order of the realm through preserving fundamental common law rights from untoward circumstances.

### 3. *Parens Patriae*

In upholding claims against public nuisances, including claims of public nuisance created by publicly exhibited sporting events, courts have cited *parens patriae* jurisdiction as a basis for intercession.<sup>1109</sup> In citing the *parens patriae* jurisdiction of the Crown as authority for actions against public nuisances, the courts are making use of a broad protective power.

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<sup>1108</sup> 152 Ind 652 at p 658-659, 53 NE 921 at p 924, (1899).

<sup>1109</sup> In *State of New York v Bridgehampton Road Races Corp* 44 AD 2d 725 (1974), the Attorney-General of New York “instituted an action as *parens patriae*” of those individuals who had been or would be injured by the alleged public nuisance created by the defendant sports corporations. Other cases where *parens patriae* jurisdiction was cited include: *British Columbia v Canadian Forest Products Ltd* [2004] SCC 38 at para [67], [2004] 2 SCR 74, (2004) 240 DLR(4th) 1; *Attorney-General of Ontario v Dieleman* [1994] 20 OR (3d) 229; and *Attorney-General of New York v Sturm, Ruger & Co Inc* 309 AD 2d 91 (2003) at p 110 (Rosenberger J dissenting). Sir George Jessel MR noted in *Attorney-General v Cockermouth Local Board* (1874) LR 18 Eq 172 at p 176: “Except for the purposes of costs, there is no difference between an ex officio information and an information at the relation of a private individual. In both cases the Sovereign, as *parens patriae*, sues by the Attorney-General.”

The history of the *parens patriae* jurisdiction was discussed at length by La Forest J in the Canadian case of *Re Eve*,<sup>1110</sup> which was cited with approval by the High Court of Australia in *Marion's Case*.<sup>1111</sup> Mr Justice La Forest observed in summarizing remarks that:

“Before going on, it may be useful to summarize my views on the *parens patriae* jurisdiction. From the earliest time, the sovereign, as *parens patriae*, was vested with the care of the mentally incompetent. This right and duty, as Lord Eldon noted in *Wellesley v Duke of Beaufort* [(1827) 2 Russ 1, 38 ER 236] at 2 Russ at p 20, 38 ER at p 243, is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its **rationale** is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise... The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the ‘best interest’ of the protected person, or again, for his or her ‘benefit’ or ‘welfare’.”<sup>1112</sup>

In *Re Frances and Benny*,<sup>1113</sup> Young CJ in Eq (as his Honour then was) said of this munificent jurisdiction:

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<sup>1110</sup> [1986] SCC 36 at paras [31]-[43], (1986) 2 SCR at pp 407-17, (1986) 31 DLR(4<sup>th</sup>) at pp 14-21, cited in *Marion's Case* [1992] HCA 15 at paras [68]-[70], (1992) 175 CLR 218.

<sup>1111</sup> [1992] HCA 15 at paras [68]-[70], (1992) 175 CLR 218.

<sup>1112</sup> *Re Eve* [1986] SCC 36 at paras [72]-[73], [1986] 2 SCR 388 (Supreme Court of Canada) (La Forest J). See also *Department of Community Services (NSW) v Y* [1999] NSWSC 644 at para [85] (Austin J) where His Honour cited *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at p 20, 38 ER 236 at p 243 (Lord Eldon LC); and *Re Thomas* [2009] NSWSC 217 at paras [22]-[30]. Lord Eldon's exact words in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at p 20, 38 ER 236 at p 243 were: “[I]t belongs to the King as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.”

<sup>1113</sup> [2005] NSWSC 1207 at para [17],

“The *parens patriae* jurisdiction derives from the royal prerogative and although its origins probably go back to the time of Edward III, in more recent centuries the Chancery Division in England and the Equity Court in New South Wales have been responsible for exercising the Queen’s power to do good to all her subjects, particularly to those who are children or otherwise incapable of looking after themselves. In exercising that jurisdiction the court’s concern is predominantly for the welfare of the person involved. It is not a jurisdiction that is bogged down at all with any technicalities. It is a quite separate jurisdiction to the supervisory jurisdiction that is committed to this court by way of prerogative orders under which this court supervises inferior courts and tribunals to make sure that they do justice and right to all people before them.”

But the *parens patriae* jurisdiction of the Crown is not only a prerogative **power**. It is also a **duty**, as was highlighted by the House of Lords in *In Re F (Mental Patient: Sterilisation)*.<sup>1114</sup>

The House explained the concept of *parens patriae* in the following terms: “...the *parens patriae* jurisdiction... is an ancient prerogative jurisdiction of the Crown going back as far perhaps as the thirteenth century. Under it the Crown as *parens patriae* had both the power and the duty to protect the persons and property of those unable to do so for themselves, a category which included both minors (formerly described as infants) and persons of unsound mind (formerly described as lunatics or idiots).” In *British Columbia v Canadian Forest Products Ltd*,<sup>1115</sup> the Supreme Court of Canada, citing *Stein v Gonzales*,<sup>1116</sup> attributed the duty of enforcing public rights to the Crown’s role as *parens patriae*.

*Parens patriae* is a doctrine of jurisdiction, incorporating both powers and obligations. It is perhaps best understood, adopting Montesquieuan language, as the relations between the courts, the Executive, and the people, where obligations are fulfilled and authority exercised on behalf of the public for the protection of common law rights. *Parens patriae* has been

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<sup>1114</sup> [1991] UKHL 1, [1990] 2 AC 1 at p 57 (Lord Brandon of Oakbrook).

<sup>1115</sup> [2004] SCC 38 at para [67], [2004] 2 SCR 74, (2004) 240 DLR(4<sup>th</sup>) 1.

<sup>1116</sup> [1984] BCSC 344, (1984) 14 DLR(4<sup>th</sup>) 263 at pp 265 and 268 (McLachlin J).

described as “the Court’s inherent jurisdiction as *parens patriae* to safeguard and oversee the welfare of those who are unable to attend to their own welfare...”<sup>1117</sup> In respect of common law public rights, *parens patriae* jurisdiction may arise in three distinct contexts. First, the jurisdiction arises as a logical extension of the ancient prerogative duty in respect of children and the mentally impaired. Secondly, *parens patriae* jurisdiction may be invoked in suits involving public rights because public rights are indivisible from the Crown. Thirdly, common law judgments in respect of public land may equate public land as ‘trust land’. Any acts purportedly harming trust land invokes *parens patriae* jurisdiction.

*Parens patriae* jurisdiction in respect of ‘those who are not able to take care of themselves’ is logically extended from its historical origins in relation to children and the mentally impaired to include also circumstances where public rights are harmed generally. This is so by virtue of the legal rule that a private person lacks capacity to sue for a public wrong.<sup>1118</sup> It is the absence of capacity to resort to the courts which invokes the Crown’s protective mantle. In *Alfred L Snapp & Son Inc v Puerto Rico ex rel Barez*, the United States Supreme Court saw the *parens patriae* jurisdiction as evolving from a particular duty in respect of certain identified persons to a duty to prevent harm generally ‘in the interests of humanity’. The court commented on the doctrine of *parens patriae* in the following way:

“*Parens patriae* means literally ‘parent of the country’. The *parens patriae* action has its roots in the common-law concept of the ‘royal prerogative’. The royal prerogative included the right or responsibility to take care of persons who ‘are legally unable, on account of mental incapacity, whether it proceed from nonage, idiocy, or lunacy, to take proper care of themselves and their property’. At a fairly early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative: ‘This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent

<sup>1117</sup> *Re Jules* [2008] NSWSC 1193 at para [7].

<sup>1118</sup> In *Gouriet v Union of Post Office Workers* [1977] UKHL 5, [1978] AC 435 at p 477 (Lord Wilberforce): “It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public.” See further *Gouriet v Union of Post Office Workers* [1977] UKHL 5, [1978] AC 435 at p 482 (Lord Wilberforce), at p 507 (Lord Edmund-Davies).



function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.”<sup>1119</sup>

Similarly, in *Mexico v Austin Decoster*, the United States Court of Appeal, First Circuit, citing *Snapp* at p 602, explained: “[*Parens patriae* jurisdiction] creates an exception to normal rules of standing applied to private citizens in recognition of the special role that a State plays in pursuing its quasi-sovereign interests in ‘the well-being of its populace.’”<sup>1120</sup>

Secondly, *parens patriae* jurisdiction may be invoked in respect of claims protecting public rights by virtue of the constitutional principle that the public’s rights are indivisible from the Crown’s rights; that is, that public rights are vested in the Crown. As Lord Wilberforce noted in *Gouriet v Union of Post Office Workers*: “In terms of constitutional law, the rights of the public are **vested in the Crown**, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the

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<sup>1119</sup> 458 US 592 (1982) at p 600, citing *Mormon Church v United States* 136 US 1 (1890) at p 57. See also *Hawaii v Standard Oil Company of California* [1972] USSC 49, 405 US 251, 92 SCt 885 (1972), where the United States Supreme Court made the following comments on the principle of *parens patriae* at paragraph [21]: “The concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the ‘royal prerogative.’ Malina & Blechman ‘Parens Patriae Suits for Treble Damages Under the Antitrust Laws’ (1970) 65 NwU LRev 193, 197; ‘State Protection of its Economy and Environment: Parens Patriae Suits for Damages’ (1970) 6 Col JL & Soc Prob 411, 412. These powers and duties were said to be exercised by the King in his capacity as ‘father of the country.’ Traditionally, the term was used to refer to the King’s power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as ‘the general guardian of all infants, idiots, and lunatics,’ and as the superintendent of ‘all charitable uses in the kingdom.’ In the United States, the ‘royal prerogative’ and the ‘*parens patriae*’ function of the King passed to the States. The nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England. This expansion was first evidenced in *Louisiana v Texas* 176 US 1, 20 SCt 251 (1900).”

<sup>1120</sup> *Mexico v Austin Decoster* [2000] USCA1 237 at para [4], 229 F3d 332 (1st Cir 2000), citing *Alfred L Snapp & Son Inc v Puerto Rico ex rel Barez* 458 US 592 (1982) at p 602. The principle at common law in the United States that *parens patriae* jurisdiction can only be found in a State’s quasisovereign interests was explained by the United States Supreme Court in *Alfred L Snapp & Son Inc v Puerto Rico ex rel Barez* 458 US 592 (1982) at p 607: “In order to maintain [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties, *ie*, the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development – neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract – certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and wellbeing – both physical and economic of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.” See also *Mexico v Austin Decoster* [2000] USCA1 237 at para [5].

public in the assertion of public rights.”<sup>1121</sup> And further, at page 481, His Lordship stated: “In the *Stockport District Waterworks Co v The Mayor of Manchester* (1863) 9 Jurist NS 266 Lord Westbury LC said this: ‘...the constitution of the country has wisely entrusted the privilege [of representing the public] with a public officer, and has not allowed it to be usurped by a private individual’. That it is the exclusive right of the Attorney-General to represent the public interest – even where individuals might be interested in a larger view of the matter – is not technical, not procedural, not fictional. It is constitutional. I agree with Lord Westbury that it is also wise.”

The Supreme Court of Canada in *Canadian Forest Products* observed that the principle of indivisibility of public rights and the Crown was first acknowledged by Bracton:

“By legal convention, ownership of such public rights [as arise in circumstances of public nuisance] was vested in the Crown, as too did authority to enforce public rights of use. According to de Bracton:

‘(It is the lord king) himself who has ordinary jurisdiction and power over all who are within his realm... He also has, in preference to all others in his realm, privileges by virtue of the *jus gentium*. (By the *jus gentium*) things are his... which by natural law ought to be common to all... Those concerned with jurisdiction and the peace... belong to no one save the crown alone and the royal dignity, nor can they be separated from the crown, since they constitute the crown.”<sup>1122</sup>

The Canadian Supreme Court then concluded at paragraph [76]:

“Since the time of de Bracton it has been the case that public rights and jurisdiction over these cannot be separated from the Crown. This notion of the Crown as holder of inalienable ‘public rights’ in the environment and certain common resources was accompanied by the procedural right of the Attorney General to sue for their protection

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<sup>1121</sup> [1977] UKHL 5, [1978] AC 435 at page 477.

<sup>1122</sup> *British Columbia v Canadian Forest Products Ltd* [2004] SCC 38 at para [76], [2004] 2 SCR 74, (2004) 240 DLR(4<sup>th</sup>) 1, citing SE Thorne (tr) *Bracton on the Laws and Customs of England* (Belknap Press of Harvard University Press Cambridge 1968) vol 2, at pp 166-67.

representing the Crown as *parens patriae*. This is an important jurisdiction that should not be attenuated by a narrow judicial construction.”

The interconnectivity of public rights and *parens patriae* jurisdiction is such that absent the Crown’s protective jurisdiction it is doubted that common law public rights would exist at all. Viscount Haldane’s dicta in *Attorney-General of British Columbia v Attorney-General of Canada*, which has been cited in Australia,<sup>1123</sup> and Canada,<sup>1124</sup> indicates that the existence of public rights may in fact be due to the protection afforded public rights under the *parens patriae* jurisdiction. Speaking of public rights of navigation and of fishing in respect of the foreshore and the high seas, his Lordship stated:

“...[T]he subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them. The right into which this practice has crystallized resembles in some respects the right to navigate the seas or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right as from immemorial antiquity the Crown as *parens patriae* no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts.”<sup>1125</sup>

A further factor supporting the beneficent jurisdiction of the Crown in respect of public rights and publicly exhibited sporting events is the principle that Crown land dedicated to

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<sup>1123</sup> *Commonwealth of Australia v Yarmirr* [1999] FCA 1668 at paras [213]-[217].

<sup>1124</sup> *R v Gladstone* [1996] SCC 160 at para [69], (1996) 2 SCR 723, (1996) 137 DLR(4<sup>th</sup>) 648; *Re Offshore Mineral Rights* [1967] SCC 71, [1967] SCR 792 at pp 801, 807.

<sup>1125</sup> [1914] AC 153 at p 169.

the public is held in trust for public use and enjoyment. In *Western Australia v Ward*, the High Court of Australia, citing *Randwick Corporation v Rutledge*,<sup>1126</sup> stated that vesting of land in trustees for purposes of the health, recreation, or amusement of the inhabitants of towns, and **any other charitable purpose**, creates a public trust.<sup>1127</sup> Where a publicly exhibited sporting event is staged at a public place such as a beach or road, the private interests of the promoters of, and of the participants in, such sporting event can never supplant public rights at common law. It is a principle of common law, known as the ‘public trust’ principle, that the people may enjoy the use of public places free from the obstruction or interference of private parties.<sup>1128</sup> Only by legislative instrument may public rights and the Crown’s *parens patriae* jurisdiction in respect of public land be abrogated.<sup>1129</sup> In Australia, courts have used public trust principles and the Crown *parens patriae* jurisdiction to injunct local governments from reclassifying public land or otherwise dealing with public land in any manner inconsistent with its designation as public land, unless such power is granted in legislation.<sup>1130</sup> The Canadian Supreme Court, citing United States Supreme Court authority, explained the ‘public trust’ principle thus:

“The American law has also developed the notion that the states hold a ‘public trust’. Thus, in *Illinois Central Railroad Co v Illinois* 146 US 387 (1892), the Supreme Court of the United States upheld Illinois’ claim to have a land grant declared invalid. The State had granted to the railroad in fee simple all land extending out one mile from Lake Michigan’s shoreline, including one mile of shoreline through Chicago’s central

<sup>1126</sup> [1959] HCA 63, (1959) 102 CLR 54 at pp 75-76 (Windeyer J).

<sup>1127</sup> [2002] HCA 28 at para [238], (2002) 213 CLR 1.

<sup>1128</sup> See *Attorney-General v Parramatta City Council* (1949) 49 SR (NSW) 283 at p 290-292 where Roper CJ held that the Attorney-General had standing to seek orders restraining a local authority from taking action which was ‘incompatible with the due exercise of [its] powers’ where that council sought to deal with public trust land in a manner inconsistent with its designation ‘as a public reserve, a public place, or cemetery, or any land subject to a trust’. In England, “the inherent power flowing from his office... enables the Attorney-General either to bring proceedings ex-officio himself or to consent to the use of his name... [in] relator proceedings for the protection of the public interest in the civil courts... to enforce a duty which a public body, such as a local authority, owes to the public”: *Attorney-General v Blake* [1997] EWCA Civ 3008, [1998] 2 WLR 805 at p 820. See also *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59 at para [54], (1998) 195 CLR 566.

<sup>1129</sup> The High Court of Australia noted in *Western Australia v Ward* [2002] HCA 28 at para [218], (2002) 213 CLR 1: “As Windeyer J pointed out in *Randwick Corporation v Rutledge* [1959] HCA 63, (1959) 102 CLR 54 at p 75 even if land were dedicated to a public purpose, it did not take the land outside the authority of the legislature... Even permanent reserves could be cancelled or the purpose of the reservation altered by statute.”

<sup>1130</sup> *Attorney-General v Parramatta City Council* (1949) 49 SR (NSW) 283; *Attorney-General v Blake* [1997] EWCA Civ 3008, [1998] 2 WLR 805 at p 820; *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59 at para [54], (1998) 195 CLR 566.

business district. It was held that this land was impressed with a public trust. The State's title to this land was different in character from that which the State holds in lands intended for sale... It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties [146 US 387 (1892) at p 452]. The deed to the railway was therefore set aside.”<sup>1131</sup>

The Canadian Supreme Court noted that the *parens patriae* ‘public trust’ doctrine has led in the United States to successful claims for monetary compensation in cases decided exclusively under the common law.<sup>1132</sup> “Under the common law in [the United States],” the court observed, “it has long been accepted that the state has a common law *parens patriae* jurisdiction to represent the collective interests of the public. This jurisdiction has historically been successfully exercised in relation to environmental claims involving injunctive relief against interstate public nuisances: see, eg, *North Dakota v Minnesota* 263 US 365 (1923) at p 374; *Missouri v Illinois* 180 US 208 (1901); *Kansas v Colorado* 206 US 46 (1907); *Georgia v Tennessee Copper Co* 206 US 230 (1907); and *New York v New Jersey* 256 US 296 (1921). In *Tennessee Copper*, Holmes J held for the Supreme Court of the United States, at p 237, that, ‘the State has **an interest independent of and behind the titles of its citizens**, in all the earth and air within its domain.”<sup>1133</sup> The *parens patriae* jurisdiction of the Crown in

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<sup>1131</sup> *British Columbia v Canadian Forest Products Ltd* [2004] SCC 38 at para [79], [2004] 2 SCR 74, (2004) 240 DLR(4th) 1.

<sup>1132</sup> *ibid*, citing *New Jersey, Department of Environmental Protection v Jersey Central Power and Light Co* 336 A2d 750 (NJ Super Ct App Div 1975); *State of Washington, Department of Fisheries v Gillette* 621 P2d 764 (Wash Ct App 1980); *State of California, Department of Fish and Game v SS Bournemouth* 307 FSupp 922 (CD Cal 1969); *State of Maine v M/V Tamano* 357 FSupp 1097 (D Me 1973), and *State of Maryland, Department of Natural Resources v Amerada Hess Corp* 350 FSupp 1060 (D Md 1972).

<sup>1133</sup> *British Columbia v Canadian Forest Products Ltd* [2004] SCC 38 at paras [78]–[80], [2004] 2 SCR 74, (2004) 240 DLR(4th) 1 (emphasis added). In *Hawaii v Standard Oil Company of California* [1972] USSC 49, 405 US 251, 92 SCt 885 (1972), the United States Supreme Court referred to these same cases noting the ratio decidendi of each case in the following terms at paragraph [22] of their judgment: “This court’s acceptance of the notion of *parens patriae* suits in *Louisiana v Texas* [176 US 1, 20 SCt 251 (1900)] was followed in a series of cases: *Missouri v Illinois*, 180 US 208, 21 SCt 331 (1901) (holding that Missouri was permitted to sue Illinois and a Chicago sanitation district on behalf of Missouri citizens to enjoin the discharge of sewage into the Mississippi River); *Kansas v Colorado* 206 US 46, 27 SCt 655 (1907) (holding that Kansas was permitted to sue as *parens patriae* to enjoin the diversion of water from an interstate stream); *Georgia v Tennessee Copper Co* 206 US 230, 27 SCt 618 (1907) (holding that Georgia was entitled to sue to enjoin fumes from a copper plant across the state border from injuring land in five Georgia counties); *People of State of New York v New Jersey* 256 US 296, 41 SCt 492 (1921) (holding that New York could sue to enjoin the discharge of sewage into the New York harbor); *Pennsylvania v West Virginia* 262 US 553, 43 SCt 658 (1923) (holding that Pennsylvania might sue to enjoin

respect of public land cannot be truncated. It is a pervasive jurisdiction existing behind the interests of citizens. Citing *Missouri v Illinois* and *Tennessee Copper*, amongst others, the United States Supreme Court commented that: “Both the *Missouri* case and the *Georgia* case involved the State’s interest in the abatement of public nuisances, instances in which the injury to the public health and comfort was graphic and direct. Although there are numerous examples of such *parens patriae* suits, eg, *North Dakota v Minnesota* (flooding); *New York v New Jersey* (water pollution); *Kansas v Colorado* 185 US 125, 22 SCt 552 (1902) (diversion of water), *parens patriae* interests extend well beyond the prevention of such traditional public nuisances.”<sup>1134</sup>

*Parens patriae* jurisdiction is a broad jurisdiction. The limits or scope of the jurisdiction have not, and cannot, be defined.<sup>1135</sup> In *Re Thomas*, the New South Wales Supreme Court said: “The breadth of the jurisdiction has often been emphasized; indeed it has been said that it is without limitation, although to be exercised with caution.”<sup>1136</sup> The Canadian Supreme Court concluded thus:

“The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in *J v C* [1970] AC 668 at p 703, the authorities are not consistent and there are many twists and turns, but they have inexorably ‘moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion...’ In other words, the categories under which the jurisdiction can be exercised are never closed... [A] court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one. The courts will

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restraints on the commercial flow of natural gas); and *North Dakota v Minnesota* 263 US 365, 44 SCt 138 (1923) (holding that Minnesota could sue to enjoin changes in drainage which increase the flow of water in an interstate stream).”

<sup>1134</sup> *Hawaii v Standard Oil Company of California* [1972] USSC 49 at para [24], 405 US 251, 92 SCt 885 (1972).

<sup>1135</sup> *Marion’s Case* [1992] HCA 15 at paras [68]-[70], (1992) 175 CLR 218, citing *Re Eve* (1986) 2 SCR 388 at p 410, (1986) 31 DLR(4<sup>th</sup>) at p 16. To the same effect were the comments of Lord Manners who stated in *Wellesley v Wellesley* (1828) 2 Bli N S 124 at p 142, 4 ER 1078 at p 1085 that, “[i]t is ... impossible to say what are the limits of that jurisdiction”. The more contemporary descriptions of the *parens patriae* jurisdiction over infants, in particular, invariably accept that in theory there is no limitation upon the jurisdiction: *In re X (A Minor)* (1975) 2 WLR 335 at pp 339-340, 342, 345, 345-346.

<sup>1136</sup> [2009] NSWSC 217 at para [29].

not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.”<sup>1137</sup>

The existence of public rights, including rights of way, rights to quietude, and rights to recreation, for example, are inexorably linked to the beneficent jurisdiction of the Crown. Indeed, such rights may owe their existence to this altruistic power.

#### 4. Montesquieu's jurisprudence

The Crown's *parens patriae* role is the role of defender of the public rights, and by extension perhaps also of the natural rights, of the people. In the context of sport these public rights and natural rights encompass the use of public spaces for enjoyment and recreation in whatever diverse manner of recreative use the people desire to pursue uninhibited by private interests or by organized activities which infringe upon those rights. People never truly relinquish their natural rights; but rather entrust to a sovereign authority, upon forming civil society, the obligation to manifest these natural rights in positive law. “For Montesquieu... civil society exists not for the sake of creating happiness but for the sake of protecting the means to happiness, or the means to each individual's avoidance of unhappiness. Civil society exists in order to secure or liberate good things which exist **prior to** civil society. The individual and his property, the family, its attachments, its customs, its morals and religion, predate the establishment of civil society (Bk 18 chs 13, 16.) For the sake of securing these good things civil society transforms them to some extent; but in principle they remain to a considerable degree autonomous...”<sup>1138</sup>

Montesquieu's two main aims in *The Spirit of the Laws* are (i) to discover how and to what extent each form of government serves man's liberty and security, and (ii) to encourage government to better administer the laws in conformity with man's nature. In Montesquieu's jurisprudence the laws which best preserve the state are those which an enlightened statesman promulgates, or an enlightened jurist declares, in cognizance of, and in

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<sup>1137</sup> *Re Eve* [1986] SCC 36 at paras [74]-[75], [1986] 2 SCR 388 (Supreme Court of Canada) (La Forest J).

<sup>1138</sup> TL Pangle *Montesquieu's Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at pp 189-90.

aid of, complex heterogeneity. Diversity exists in the variety of governmental models discussed in his thesis, in the influence of geography, climate and history on political laws, and in the recognition which each statesman and jurist ought to give to man's nature, his natural rights, and his sentimentality in the promulgation of positive law. Montesquieu spoke of law as a relation because he did not regard it as the command of a superior or the will of the sovereign. Laws are the complex relations subsisting amid the exercise of authority by the judiciary, the legislature, and the Executive; and amid the people in their dealings with their government and their fellow citizens.<sup>1139</sup>

In *The Spirit of the Laws*, Montesquieu discusses in considerable detail disparate governmental models, among them classical republicanism, judicialized monarchism, and autocracy, taking for his models historical exemplars of government and politics. Montesquieu did not decry any particular form of politics because he believed that liberty, stemming from a proper division of powers among competing institutions within any governmental form, and also security, arising from laws protecting life, liberty, and property, could exist in democracies, aristocracies, or monarchies since all such states can be constructed to achieve moderation (Bk 11, ch 4). What Montesquieu highlights in his jurisprudence is that whilst the principles of all existing governments, the principles which determine **who** rules, can be shown to be correct or legitimate (irrespective of the form which a government takes), the application and administration of the principles of some governments can be shown to require improvement (Bk 29, chs 16-19). "This seems implied in Montesquieu's statement that he wishes: 'to make it so that everyone will have new reasons for loving his duties, his prince, his fatherland, his laws; that one can better feel his happiness in each country, in each government, in each state where he finds himself...'"<sup>1140</sup> The key principle for the preservation of any governmental form is the principle of moderation (Bk 29, ch 1). "Throughout his work, Montesquieu reiterates the need for moderate law and judging, one grounded in a humane conception of natural right. Montesquieu begins with a quite amorous rendering by a French poet of the opening of the *De rerum natura*, in which Lucretius praises the passions

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<sup>1139</sup> See JN Shklar *Montesquieu* (Oxford University Press Oxford 1987) at p 71.

<sup>1140</sup> Preface, and see TL Pangle *Montesquieu's Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at p 22, citing R Caillois (ed) *Oeuvres complètes de Montesquieu* (Bibliothèque de la Pléiade edn Gallimard Paris 1949-51) vol 1, at p 230. Montesquieu's liberalism, with its distrust of all governments, remains an essential part of any complete theory of political freedom: JN Shklar *Montesquieu* (Oxford University Press Oxford 1987) at p 126.



and sexuality. This sets the tone for the book, encouraging the ‘prudent’ legislator to discern a middle state between the worldliness of the Romans and the otherworldliness of Christianity...”<sup>1141</sup>

Montesquieu viewed a state of blind obedience to the will of the collective, and blind ignorance of the legal affects of such obedience, as the greatest calamity that could befall a state.<sup>1142</sup> A democratic model of government which establishes mores by simple majority can prove as illiberal as a despotic model. Montesquieu tries to show in a dispassionate way the contradictions in the kind of republicanism he considered the greatest challenge to his principles; that characterized by extensive direct political participation, de-emphasis on prosperity, and a deep sense of community.<sup>1143</sup> A republic form of government which rests on the passion of public spirit or ‘virtue’ and which animates such a community and such a government, is incompatible with human nature. Montesquieu cited the classical republican model of government of ancient Rome as a model incompatible with nature and therefore inherently volatile. Liberty is sacrificed to political and cultural homogeneity in a republic of ‘virtue’, just as can occur in a despotic government or monarchic government.

A democracy can fail to support public rights generally, and diverse recreative practices in particular, and may in fact undermine such rights and practices. In *Dewar v City and Suburban Race Course Co*, the court warned of the dangers arising from tyranny by majority rule. Injuncting public horse races on Sundays, the court stated that: “No majority, however large,

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<sup>1141</sup> PO Carrese *The Cloaking of Power – Montesquieu, Blackstone and the Rise of Judicial Activism* (University of Chicago Press Chicago 2003) at p 77.

<sup>1142</sup> JN Shklar *Montesquieu* (Oxford University Press Oxford 1987) at pp 87 and 110, citing *Pensées* in A Masson (ed) *Oeuvres complètes de Montesquieu* (Les Editions Nagel Paris 1950-55) vol 2, at p 1252.

<sup>1143</sup> In Bk 8, ch 2, Montesquieu writes: “The principle of democracy is corrupted not only when the spirit of equality is lost, but also when the spirit of extreme equality is taken up and when each citizen wants to be the equal of those chosen to command him. So the people, finding intolerable even the power they entrust to others Then the people, incapable of bearing the very power they have delegated, want to manage everything themselves, to debate for the senate, to execute for the magistrates, and to cast aside all the judges. When this is the case, virtue can no longer subsist in the republic. The people are desirous of exercising the functions of the magistrates, who cease to be revered. The deliberations of the senate are slighted; all respect is then laid aside for the senators... We find in Xenophon's *Banquet* a very lively description of a republic in which the people abused their equality... Democracy has, therefore, two excesses to avoid — the spirit of inequality, which leads it to aristocracy or to the government of one alone, and the spirit of extreme equality, which leads it to despotic power...” See R Caillois (ed) *Oeuvres complètes de Montesquieu* (Bibliothèque de la Pléiade edn Gallimard Paris 1949-51) vol 1; AM Cohler BC Miller and HS Stone (tr) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 112; or JV Prichard (ed) T Nugent (tr) *Charles de Secondat, Baron de Montesquieu: The Spirit of Laws* (G Bell & Sons London 1914).

is entitled to interfere with the common right of a minority, though small, to the enjoyment of the comfort and quiet of their homes, and the free use of the public thoroughfares which lead to them. The Legislature alone, acting for the common weal, has this power entrusted to it.”<sup>1144</sup> Montesquieu was much concerned with the establishment of a ‘humanized’ or ‘humane’ society. He wanted to uncover the political conditions which promote it. His jurisprudence is the idea that any constitution which fails to honour natural rights and the complex relations subsisting in the concept of law, in the administration of power and of law, is incompatible with human nature – diversity, liberty, tranquility and security are the four pillars upon which law rests in Montesquieu’s jurisprudence.<sup>1145</sup> Montesquieu is viewed for “the seriousness of his concern for natural right” and “the seamlessness he saw between a stable constitutionalism and the protection of natural rights.”<sup>1146</sup>

Montesquieu’s warnings of the inherent instability of a political society where cultural identity is homogenized by passion and sovereign will, whether republican or monarchical, is perhaps most clearly illustrated by the contest of authority between the monarch and Parliament in Britain prior to the Civil War and the Glorious Revolution in 1688. In the context of sports, this contest of authority was played out in the *Declaration of Sports* of James I on 24 May 1618; the further promulgation of that declaration by Charles I on 18 October 1633 as *The King’s Majesty’s declaration to his subjects concerning lawful sports to be used*; and the subsequent hostility to these *Declaration of Sports* by puritans who gained power in Parliament in the lead-up to the English Civil War. Puritan hostility to the *Declaration of Sports* grew, enforcement of the declaration ended in 1640, and the Interregnum Parliament ordered the book publicly burned in 1643.

The actions of both James I and Charles I, despite their obvious political failings, evidence, to a degree, the concern for the peoples recreations which the Crown ought to show as protector of public rights. James I, finding “that his subjects were debarred from lawful recreations upon Sundays after evening prayers ended, and upon Holy-days; ...he prudently considered that, if these times were taken from them, the meaner sort who labor hard all the

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<sup>1144</sup> [1899] 1 IR 345 at p 356.

<sup>1145</sup> See TL Pangle *Montesquieu’s Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at pp 4-5.

<sup>1146</sup> PO Carrese *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (University of Chicago Press Chicago 2003) at p 240.

week should have no recreations at all to refresh their spirits... and did therefore in his princely wisdom publish a *Declaration* to all his loving subjects concerning lawful sports to be used at such times, which was printed and published by his royal commandment in the year 1618.” James I proclaimed that the people should not be molested in their recreations, stating, “as for our good people’s lawful recreation, our pleasure likewise is, that after the end of divine service our good people be not disturbed, letted or discouraged from any lawful recreation, such as dancing, either men or women; archery for men, leaping, vaulting, or any other such harmless recreation, nor from having of May-games, Whitsun-ales, and Morris-dances; and the setting up of Maypoles and other sports therewith used...” Although, “bear and bull-baiting, interludes, and (at all times in the meane sort of people by law prohibited) bowling” were not to be permitted on Sunday.<sup>1147</sup> The Crown was not legislating to grant a right otherwise denied to them by legislation. The power of puritanical parliamentarians was not directly threatened. Rather, the Crown sought to fulfil a *parens patriae* duty to preserve public rights in the face of opposition from majoritarian puritanical rule.

What was perhaps missing from the fracas between the royalists and the parliamentarians was a prudent moderating authority which could engage with the Crown, the legislature and the people to promulgate laws reflective of the natural rights of man.<sup>1148</sup> There can be no law or strict rules for the guidance of political societies beyond the law of nature, according to Montesquieu.<sup>1149</sup> And it is clear from Montesquieu’s writings in praise of the moderating power of a judiciary within the constitutional monarchical governmental system in the early books of *The Spirit of the Laws* leading up to the constitutionalism fully presented in books 11

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<sup>1147</sup> *The Booke of Sports* as set forth by Charles the I (Issued by King James, May 24 1618 and re-enacted Oct 18 1633) (Baker London 1533 [1633] reprinted 1709) (British Library Shelfmarks G.14061.(6.) T.1810.(14)). See also D Wilkins *Concilia* (Brussels 1964) vol iv, at p 483; and —“Styles of Belief, Devotion, and Culture – James I/Charles I, from *The King’s Majesty’s Declaration to his Subjects Concerning Lawful Sports to be Used*” The Norton Anthology of English Literature <[http://www.wwnorton.com/college/english/nael/17century/topic\\_3/sports.htm](http://www.wwnorton.com/college/english/nael/17century/topic_3/sports.htm)> (1 June 2008).

<sup>1148</sup> “The crucial innovation,” in Montesquieu’s constitutional theory, “is adding a third power, of a distinctly nonpredatory and more reasonable character, to provide the individual security that his liberal predecessors seek, without their constant worry about regression into war. A judicialized constitution builds the safety valve into the everyday system, in accord with the actual judicial practices and legal customs developed in many European countries through a “Gothic” common law and court system (see Bks 6, 12, and 28): PO Carrese *The Cloaking of Power – Montesquieu, Blackstone, and the rise of judicial activism* (University of Chicago Press Chicago 2003) at p 25.

<sup>1149</sup> TL Pangle *Montesquieu’s Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at p 274.

and 12, that this pillar of his constitutionalism is also a weapon in his critique not only of autocratic despotism but of the moral despotism in classical republican virtue and classical political philosophy. A judicial depository of laws, in tempering both Executive power and censorious majoritarianism, embodies the balance and complexity that are ‘the excellence’ of constitutional monarchism (Bk 5 ch 10). But an activist Executive may pander to majoritarianism, particularly in respect of public sports, and may promote public sports and ignore the public’s rights. Montesquieu argues that the very structure of politics can determine affairs safely, but only if constituted so that decisions are made both as necessity requires and in accord with a moderate, humane conception of natural right. His analysis of the separation of powers in the English constitution observes that the “three powers ought to form a repose,” but since “by the necessary motion of things, they are constrained to move, they will be forced to move in concert” (Bk 11 ch 6).<sup>1150</sup> Governments can avoid the cycle of despotism and popular revolution only through the employment of ‘intermediate dependent powers’ who possess the ‘prudence and authority’ to propose compromises and restore the rule of law (Bk 5 ch 11, 290-91).<sup>1151</sup> Yet to say that Montesquieu believes that judges alone are saviours of civil rights is to also misunderstand Montesquieu’s theory. Contrarily, Montesquieu believed that full respect needed to be paid to the complex character of the separation of powers and the complex character of man’s sensibilities. For Montesquieu, the idea that any power, even judging, could rule absolutely does not square with our nature.<sup>1152</sup>

Montesquieu’s humane, softer conceptions of moderation and natural right directly guide his version of constitutionalism, jurisprudence, and judging. Better is it to say, that the

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<sup>1150</sup> In Bk 5, ch 14, Montesquieu also writes: “To form a moderate government, it is necessary to combine the several powers; to regulate, temper, and set them in motion; to give, as it were, ballast to one, in order to enable it to counterpoise the other. This is a masterpiece of legislation; rarely produced by hazard, and seldom attained by prudence.” See R Caillois (ed) *Oeuvres complètes de Montesquieu* (Bibliothèque de la Pléiade edn Gallimard Paris 1949-51) vol 1 at p 405; AM Cohler BC Miller and HS Stone (tr) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 1989) at p 112; or JV Prichard (ed) T Nugent (tr) *Charles de Secondat, Baron de Montesquieu: The Spirit of Laws* (G Bell & Sons London 1914). See also Bks 6, 12, and 28: PO Carrese *The Cloaking of Power – Montesquieu, Blackstone, and the rise of judicial activism* (University of Chicago Press Chicago 2003) at p 25.

<sup>1151</sup> See further PO Carrese *The Cloaking of Power – Montesquieu, Blackstone and the Rise of Judicial Activism* (University of Chicago Press Chicago 2003) at p 33. See also TL Pangle *Montesquieu’s Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at p 47.

<sup>1152</sup> See PO Carrese *The Cloaking of Power – Montesquieu, Blackstone, and the rise of judicial activism* (University of Chicago Press Chicago 2003) at p 28-29.

government most conformable to nature is that which best agrees with the humour and disposition of the people in whose favour it is established (Bk I, ch 3). Careful attention to the administration of justice and to the contents of the statute-book is also necessary if the liberty of the subject is to be safeguarded.<sup>1153</sup> The people can only possess their public rights where the political superstructure engages with the people to protect those rights. If a culturally homogeneous majoritarian society determines the laws based purely on their passions for particular pursuits, then diversity of cultural pursuits and the substantive nature of public rights and natural rights are crippled. Such a 'democratic' society may arbitrarily impinge on public rights to recreation and limit diversity in recreative and sports practice in preference for and in favour of a narrow pool of jingoistic sports. The danger is that the members of a society may become so homogeneous in their sports practices that any trace of cultural diversity vanishes. In the context of sports, such danger becomes evident in the conflict between persons using public spaces such as beaches, parks and the highway. Ought the individual citizen's public right and natural right to pursue his own play and recreation at a public place dedicated to him for his use be always subservient to the jingoistic cultural passions of a majority?

The law is the relations existing between the disparate players in political society. The most influential sphere of social life is the political sphere, the sphere in which men deliberately, intentionally, and authoritatively choose and shape a collective way of life.<sup>1154</sup> Montesquieu "...argues that liberty can of itself achieve security only if our activities and passions are structured according to the dynamics prescribed by the laws of nature... Nature indicates that politics must be structured in terms of multiple powers and perspectives that at once check and facilitate the free movement of political passions and energies."<sup>1155</sup> Liberty, complex constitutionalism, and natural right are the three principles of Montesquieuan

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<sup>1153</sup> MH Waddicor *Montesquieu and the Philosophy of Natural Law* (Martinus Nijhoff The Hague 1970) at p 135.

<sup>1154</sup> For Montesquieu, the nature of a society is derivative primarily from the nature and principle of the government, not vice versa. "The principle of each government has a *supreme* influence on the laws... One will see the laws flow from it as from their source: Bk 1 ch 3, R Cailliois (ed) *Oeuvres complètes de Montesquieu* (Bibliothèque de la Pléiade edn Gallimard Paris 1949-51) vol 1, at p 238. This is why the notion of 'the legislator' plays so great a role throughout *The Spirit of the Laws*." TL Pangle *Montesquieu's Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at p 44.

<sup>1155</sup> PO Carrese *The cloaking of power – Montesquieu, Blackstone, and the rise of judicial activism* (University of Chicago Press Chicago 2003) at p 20.

jurisprudence which underscore successful socio-political society.<sup>1156</sup> When Montesquieu writes of law as the relations between the government and the people, what he is saying is that the law can only be realized when the disparate organs of government engage with each other to facilitate liberty. 'The genius of a moderate politics – of the spirit of laws properly conceived – is to grasp our nature in all its complexity and constitute laws and institutions that will preserve all its dimensions.'<sup>1157</sup> Montesquieu asks of us that we acknowledge the principled difference between liberty and short-term utility and the distinction between separation of powers and a formless policy-making or administrative power in a government. Montesquieu links the means of complex constitutional forms and enduring natural rights to the ends of liberty and natural rights. The spirit of the laws is the spirit of constitutional government, where all organs of government exercise a moderate and prudent discretion in promoting individual tranquillity.<sup>1158</sup> Liberty and justice are confirmed in the very structure of a government where a complex constitution and a separation of powers operates in partnership to prudently administer the laws. If governments boldly legislate or radically transform the law, they sacrifice not only the forms but the ends of a decent legal order.<sup>1159</sup>

## 5. Concluding remarks

The common law principles of the Royal Peace and *parens patriae*, and jurisprudential logic touching on the prudence of recognizing natural rights and public rights, compound to form a constitutional rule of behaviour for the Executive government within a complex

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<sup>1156</sup> See further PO Carrese *The Cloaking of Power – Montesquieu, Blackstone and the Rise of Judicial Activism* (University of Chicago Press Chicago 2003) at pp 106-107; MH Waddicor *Montesquieu and the Philosophy of Natural Law* (Martinus Nijhoff The Hague 1970) at pp 39-40 and 43, citing *Pensée* 883.

<sup>1157</sup> *ibid.*

<sup>1158</sup> The intention of the work as a whole has been to prove what should be the spirit of the legislator (Book 29 ch 1); TL Pangle *Montesquieu's Philosophy of Liberalism* (University of Chicago Press Chicago 1973) at p 271. The spirit of the legislator should be one of 'moderation'. This spirit of moderation as Montesquieu emphasizes is intimately connected with the realization that 'liberty' or 'security' is the true goal. Moderation also includes a certain mellowness, softness or humanity (Bk 19 ch 5; Bk 29, ch 2). In conjunction with his discussion of moderation Montesquieu also consider the 'prudence' of the legislator (Bk 19, ch 5; Bk 29, chs 5, 7) – the capacity to adapt goals to particular circumstances. The key circumstance to be considered is the nature of the regime for which the laws are to be given; the legislator must adapt his general understanding of the needs to be satisfied to the way those needs appear in his own political order (Bk 19, ch 5; Bk 29, ch 3). The legislator must also reflect on how the law will change the circumstances; he must try to foresee the indirect as well as the direct effects of a law (Bk 19, chs 4, 5; Bk 29, chs 4, 5).

<sup>1159</sup> PO Carrese *The Cloaking of Power – Montesquieu, Blackstone and the Rise of Judicial Activism* (University of Chicago Press Chicago 2003) at p 107.

constitution. In some common law jurisdictions, the Executive fails to see its lawful function as protector of public rights, and in lieu, through organizations managed directly by the Executive, facilitates and financially supports the staging of publicly exhibited sporting events to the detriment of public rights. In the Australian state of Queensland, for example, the Crown operates through several private companies, such as Queensland Events Corporation Pty Ltd ACN 010 814 310,<sup>1160</sup> and Gold Coast Events Co Pty Ltd ACN 010 949 649,<sup>1161</sup> which companies are private companies limited by shares registered with the Australian Securities and Investments Commission, to support publicly exhibited sporting events. Neither of these private companies is supported by any legislative enactment granting them authority to act in contradistinction to the common law. Similarly, in the state of Victoria the Executive operates Victorian Major Events Company Limited ACN 050 270 089, a public company limited by guarantee.<sup>1162</sup> There is no legislative enactment of the Victorian Parliament providing this public company with power to act in contradiction to the common law.

Facilitating the staging of a publicly exhibited sporting event which infringes public rights, by the Executive, is unlawful at common law as being a public nuisance. Just as local governments may not license the commission of a public nuisance, neither may the Executive, either directly or through a corporation, give money or other support for the staging of a publicly exhibited sporting event which creates a public nuisance.<sup>1163</sup> The Crown's behaviour in such circumstances places them in the position of an accomplice to

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<sup>1160</sup> In Queensland, the Executive operates through an organization called 'Queensland Events', managed under the personal portfolio of the Premier of Queensland, to promote and financially support publicly exhibited events, including sporting events, in Queensland: <<http://www.qldevents.com.au/>> (7 Aug 2008). Register of Appointees to Queensland Government Bodies <<http://statauth.premiers.qld.gov.au/board-details.aspx?bid=757>> (7 August 2008).

<sup>1161</sup> GCEC is the primary vehicle for the Government 50% ownership of the Gold Coast Motor Events Co which conducts the IndyCar event on the Gold Coast: Register of Appointees to Queensland Government Bodies <<http://statauth.premiers.qld.gov.au/board-details.aspx?bid=727>> (7 Aug 2008)

<sup>1162</sup> see <<http://www.vmec.com.au/home.html>> (7 Aug 2008). Victorian Government Organisations Register <<http://www.agencies.vic.gov.au/public/entityshow.asp?mode=search&ID=845&minID=>>> (7 Aug 2008).

<sup>1163</sup> "Neither the King nor the lord of the manor can give any liberty to erect a common nuisance": *Dewell v Sanders* (1619) Cro Jac 490, 79 ER 419; *Fowler v Sanders* (1617) Cro Jac 446, 79 ER 382. "It is generally laid down in the books, that the Crown cannot pardon a common nuisance whilst it remains unredressed, and is continuing; so as to prevent abatement of it, or a prosecution against the offender: though his Majesty might afterwards remit the fine. As the continuation of a nuisance is, of itself, a fresh offence in point of law; this doctrine may be supported on the ground that the King cannot... dispense with the laws by any previous license." J Chitty *Prerogatives of the Crown* (Butterworths London 1820) at p 91, citing 12 Co 30, 2 Hawk b 2 c 37 s 33, 4 Bla Com 398, Ld Raym 370, 713.

the commission of a common law offence. The Executive's obligations are those confined to their *parens patriae* jurisdiction to protect public rights from arbitrary infringement. The Executive lacks power to alter the common law unilaterally or arbitrarily.

"Political liberty is to be found," writes Montesquieu, "only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits? To prevent this abuse, it is necessary from the very nature of things that power should be a check to power" (Bk 11, ch 4). If the Executive wishes to promote homogeneous cultural pursuits to the detriment of public rights, the Executive must turn to Parliament and ask Parliament to change the common law and to give power to the Executive to operate organizations in support of publicly exhibited sporting events. Such grant of power by Parliament ought to be made prudently in due consideration of extant public rights and the impact which the staging of publicly exhibited sporting events may cause to such public rights.



## Chapter 16

### Toward a modern regulatory framework

This thesis has demonstrated that a sporting event staged at a public space such as a beach, a park, or on a road, may be unlawful as a common law public nuisance. A public sporting event may create a public nuisance by obstructing or interfering with the public in the exercise of their right of way on the highway, in respect of the right of navigation or of fishing at the foreshore and in the sea, or in respect of their right to recreation on a beach or in a park. Further, a public sporting event may create a public nuisance in drawing crowds which obstruct or interfere with the preceding nominated public rights or which, in creating noise, impinge the common law public right to quietude. Public rights to safety and to life may also be impinged by the staging of sporting events in public. This thesis does not argue, however, that publicly exhibited sports events *should* be unlawful when they are staged at public spaces.

Public exhibitions of sporting competition have commendable cultural and social benefits for the citizens of a State. Yet such cultural and social benefits ought not justify the narcissistic display of sporting competition to the harm of individuals or minorities who may desire recourse to the same public space where publicly exhibited sports events are staged. Members of the public who desire recourse to a public park in order to sit and read a book ought not be peremptorily required to surrender their right to use of the public park to a sporting federation. Public nuisance precedents emphasize that public rights are at risk of subjugation to the mercenary intentions of sporting associations. These modern mercenary

intentions can dissipate the cultural and social benefits accruing to citizens witnessing public exhibitions of sport. There exist justifiable grounds for limiting an unchecked mercenary intention on the part of sporting associations staging public exhibitions of sport where those intentions impinge upon public rights.

It is not suggested that beach or surf sports, or sports which utilize public beaches, parks and highways, should not be conducted at all. That would be detrimental for culture and for seaside communities whose localized economies oftentimes rely on major sporting events. Public sporting events which utilize public spaces, such as beaches, public parks and public highways are important cultural events, particularly so in countries such as Australia where the beach, and sport generally, are fundamental aspects of lifestyle. Rather, what is suggested here is that public sports events such as Triathlon, Marathon, Ironman competitions, and Surf Lifesaving competitions should be conducted in such a way as to not arbitrarily interfere with, obstruct or impinge upon common law public rights. Furthermore, in light of the susceptibility of such public sporting events to proscription as public nuisances at the suit of members of the public, such sporting events ought to be protected by law. Presently, almost every public sports event which appropriates public spaces for use by elite athletes competing in a sponsored competition is in danger of abatement under the common law rules dealing with public nuisances. Only those public sporting events for which specific legislative enactments have been promulgated, such as motorsport, horseracing and professional boxing, may be protected from proscription by a suit for abatement on grounds of public nuisance.<sup>1164</sup> This is so because there is no general legislative enactment to protect all sports; to protect such important cultural activities. Strict legal logic reveals that public sporting events which utilize public beaches, parks or highways are, at common law, a public nuisance per se because they obstruct the public right to free use of, enjoyment of, or passage along the public beaches, parks, or highways. It matters not that the public sports are tolerated, or even enjoyed. In public nuisance suits public rights prevail always over the self interest of sports associations or sports club promoting a particular sport. The common law prescribes that this is the result in any conflict between organized sport on the one hand, and individual citizens exercising their public rights, on the other. And the only means by

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<sup>1164</sup> See, eg Australian Grand Prix Act 1994 (Vic).

which this common law may be changed is by Parliament formally altering the common law by legislation.

If we desire to champion the staging of public sporting events as cultural endeavours, rather than merely as pecuniary activities, then we ought to ensure, as a society, that such events are free from legal challenge and that they are staged lawfully, giving due and full consideration to the interference with public rights which might arise by the staging of such sporting events at public places. The license of the Crown is not sufficient in law to alter this common law proposition. Nor is the license of any local government sufficient, under existing legislative arrangements. It has been known since at least the seventeenth century that “none can prescribe to make a common nuisance”: *Dewell v Sanders*,<sup>1165</sup> *Fowler v Sanders*.<sup>1166</sup> And powers granted to local governments in their enabling legislation do not change this position. Whilst local governments in jurisdictions such as Queensland or New South Wales, for example, are empowered to make laws for the “peace, welfare and good government” of their local area, such powers **do not include** a power to alter the common law. Fundamental rights cannot be overridden by general or ambiguous words in a statute – *Ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 at p 131. Furthermore, there is a presumption against a parliamentary intention to infringe upon common law rights and freedoms – *Ex parte Pierson* [1997] UKHL 37, [1998] AC 539 at p 587 (Lord Steyn); *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ).<sup>1167</sup>

The Crown has a choice of only three options when facing this legal conflict. The Executive can either ignore the issue entirely and risk undermining their position as *parens patriae*, or it

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<sup>1165</sup> (1619) Cro Jac 490, 79 ER 419.

<sup>1166</sup> (1617) Cro Jac 446, 79 ER 382.

<sup>1167</sup> See further *Bropho v Western Australia* [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18), citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; *Ex parte Walsh and Johnson, In re Yeats* [1925] HCA 53, (1925) 37 CLR 36 at p 93; and *Ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 at p 131. And see the discussion in Chapter 14 of this thesis. We know from judicial pronouncements such as of the High Court of Australia in *Bropho v Western Australia* [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18), citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; *Ex parte Walsh and Johnson, In re Yeats* [1925] HCA 53, (1925) 37 CLR 36 at p 93; and *Ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 at p 131, that powers granted in local government enabling legislation, such as powers to make laws for the ‘peace, welfare and good government’ over their area, **do not include** a power to license a public nuisance or to alter the common law. Such legislation does not use irresistibly clear language. The power to make by-laws regulating a subject matter does not extend to prohibiting it and must not prevent or even suppress the thing or course of conduct to be regulated – *Swan Hill Corporation v Bradbury* [1937] HCA 15, (1937) 56 CLR 746 at p 762 (Dixon J)

can institute civil proceedings to abate each and every public sporting event which causes an obstruction of the public beaches, parks, or highways, in order to protect and preserve the public rights of the people from arbitrary impingement, or, alternatively, the Executive can manage the situation by facilitating a legislative agenda to authorize each and every sporting event which utilizes public beaches, parks, or highways, in the public interest. The Crown may not act arbitrarily, as it presently appears to do through public event promotional corporations, by supporting economically and politically the staging of publicly exhibited sporting events in contradistinction to its primary duty as *parens patriae* to protect and preserve public rights. The Crown's duty is to protect public rights from unfettered impingement by public sporting pursuits.

If the Crown wishes to engage with the people to promote publicly exhibited sporting events, the Crown must first turn to Parliament and ask Parliament to promulgate law to alter the common law rules and to grant power to the Crown to so act. The doctrine of parliamentary supremacy applies. Parliamentary enactment will likely have positive results for the preservation of public rights, for the protection of culturally significant sporting activities, and for diversity in sports practice. Diversity in the types of sports publicly exhibited and in the manner in which such sports are publicly exhibited ought to be an important objective in any modern statute regulating sport. An unregulated public sporting environment can lead to either an oligarchic sporting culture where there is domination by a small number of financially wealthy sporting associations harming diversity; or this unregulated public sporting environment can lead to an anarchic sporting culture where there is exponential growth in the number of publicly exhibited sporting activities to the harm of public rights. One situation fails to protect the cultural and social benefits accruing from diversified practice of diverse sporting pursuits. The other situation fails to protect public rights from unreasonable sports practice. Parliament has an essential role to perform in regulating public sporting endeavour so as to simultaneously guarantee diversity in sports practice and the protection of public rights. The only viable means of regulating publicly exhibited sporting endeavour, to ensure a balance between diversified sporting practice and the protection of public rights, is through legislative intervention.

Public rights and public exhibitions of sporting events are incompatible. Statutory intervention will ensure that an appropriate balance is achieved between the interests of private citizens and the benefits of culturally significant public sporting events. Public rights can be protected and the narcissism and immoderation of public sporting events minimized. This form of regulation best ensures that a wide number of considerations are applied in determining how, when and where publicly exhibited sporting events are staged. There are three possible modes of statutory regulation which Parliament may use. These three modes of regulation are:-

- (1) Amend Local Government Acts to grant power to local governments to authorise publicly exhibited sports events, because existing legislation granting powers to local government to make local laws for the “peace, welfare and good government” of their local area **do not include** or encompass a power to alter the common law or to prevent or even suppress public rights or common law rights - *Swan Hill Corporation v Bradbury* [1937] HCA 15, (1937) 56 CLR 746 at p 762 (Dixon J); *Bropho v Western Australia* [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18), citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; *Ex parte Walsh and Johnson, In re Yeats* [1925] HCA 53, (1925) 37 CLR 36 at p 93; and *Ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 at p 131.<sup>1168</sup>
- (2) Promulgate a new statute, being State and Territory statutes within Australia and not a Commonwealth statute, for each and every publicly exhibited sports event authorising such sports event and declaring that such sports event is not a public nuisance; or

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<sup>1168</sup> See further the discussion in Chapter 14 of this thesis, and see *Johnson v City of New York* 186 NY 139, 78 NE 715 (1906); *Hill v City of New York* 139 NY 495, 34 NE 1090 at p 1092 (1893); *Attorney-General v Blackpool Corporation* (1907) 71 JP 478. Local authorities lack powers to alter common law rules without a further grant of power from the State. Public nuisance is a common law rule existing to protect and preserve public rights and no local authority may act arbitrarily to remove these public rights from the people without express grant to so do from the supreme legislature. The supreme legislature must use irresistibly clear language in its enabling legislation to ensure that a local authority is sufficiently empowered: see *Bropho v Western Australia* [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18), citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; *Ex parte Walsh and Johnson, In re Yeats* [1925] HCA 53, (1925) 37 CLR 36 at p 93; and *Ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 at p 131; *Swan Hill Corporation v Bradbury* [1937] HCA 15, (1937) 56 CLR 746 at p 762 (Dixon J); *R v Greenbaum* [1993] SCC 166, [1993] 1 SCR 674 at pp 687-88 (Iacobucci J) (“Courts must be vigilant in ensuring that municipal governments are not permitted by their enabling legislative enactments to make by-laws which impinge upon civil or common law rights”); *Ex parte Pierson* [1997] UKHL 37, [1998] AC 539 at p 587 (Lord Steyn) (“There is a presumption against a parliamentary intention to infringe upon common law rights and freedoms”); *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ).

- (3) Establish a new Act of Parliament to cover the field; being State and Territory statutes within Australia and not a Commonwealth statute. This new statute would grant power to the Minister of Sport to issue a license to promoters of proposed publicly exhibited sporting events which comply with criteria detailed in the Act.

## 1. Amend Local Government Acts

Most local governments already possess care and control management responsibilities for public spaces within their local area pursuant to legislation. Such responsibilities include powers that are devolved from the State to a local authority,<sup>1169</sup> and may be withdrawn from the local authority by the State at any time.<sup>1170</sup> Many local governments already exercise a degree of practical authority over publicly exhibited sporting events because they in fact grant licenses to sporting associations to use of land under the care and management of the local government. However, such licenses are inadequate as a matter of law to protect the publicly exhibited sporting event from proscription as a common law public nuisance, because such license has no weight in law to authorize the commission of a public nuisance or obstruct or interfere with public rights.<sup>1171</sup>

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<sup>1169</sup> Local governments are entirely creatures of statute and have only such powers as are delegated them by the State of which they are a subdivision – see section 51 of the Constitution Act 1902 (NSW); *Attorney-General v Blackpool Corporation* (1907) 71 JP 478; *R v Greenbaum* [1993] SCC 166, [1993] 1 SCR 674 at p 687 (Iacobucci J); *Breard v Alexandria* [1951] USSC 71, 341 US 622 at p 640, 71 SCt 920 at p 931; *Avery v Midland County* [1968] USSC 60, 390 US 474 at p 480, 88 SCt 1114 at p 1118; *Hunter v Pittsburgh* [1907] USSC 157, 207 US 161 at pp 178-79.

<sup>1170</sup> See, eg, section 51 of the Constitution Act 1902 (NSW).

<sup>1171</sup> See further the discussion in Chapter 14 of this thesis, and see *Johnson v City of New York* 186 NY 139, 78 NE 715 (1906); *Hill v City of New York* 139 NY 495, 34 NE 1090 at p 1092 (1893); *Attorney-General v Blackpool Corporation* (1907) 71 JP 478. Local authorities lack powers to alter common law rules without a further grant of power from the State. Public nuisance is a common law rule existing to protect and preserve public rights and no local authority may act arbitrarily to remove these public rights from the people without express grant to so do from the supreme legislature. The supreme legislature must use irresistibly clear language in its enabling legislation to ensure that a local authority is sufficiently empowered: see *Bropho v Western Australia* [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18, citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; *Ex parte Walsh and Johnson, In re Yeats* [1925] HCA 53, (1925) 37 CLR 36 at p 93; and *Ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 at p 131; *Swan Hill Corporation v Bradbury* [1937] HCA 15, (1937) 56 CLR 746 at p 762 (Dixon J); *R v Greenbaum* [1993] SCC 166, [1993] 1 SCR 674 at pp 687-88 (Iacobucci J) (“Courts must be vigilant in ensuring that municipal governments are not permitted by their enabling legislative enactments to make by-laws which impinge upon civil or common law rights”); *Ex parte Pierson* [1997] UKHL 37, [1998] AC 539 at p 587 (Lord Steyn) (“There is a presumption against a parliamentary intention to infringe upon common law rights and freedoms”); *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ).

It is possible that a simple amendment to local government legislation can have the effect of legalising publicly exhibited sporting events that are presently spuriously licensed by local governments. It is also possible that such amendment could require a local government to appraise the impact of the proposed public sporting event prior to granting a license. Such appraisal could weigh the following factors:

- 1) the impact on public rights against the cultural, social and economic benefits to the local community;
- 2) the manner in which the sporting association that is staging the public sporting event proposes to limit impingement of public rights;
- 3) whether the proposed public sporting event unreasonably impinges on recreative pursuits at the place where the proposed event is to be staged;
- 4) the degree of violence occurring in the proposed public sporting event, in order to minimize displays of violence;
- 5) impacts on the environment by the staging of the public sporting event;
- 6) impacts on the local economy by the staging of the public sporting event;
- 7) the degree and manner in which the proposed public sporting event is to be staged to limit excessive displays of one sport more than any other, ensuring diversity in sports practise in the local community;
- 8) whether a fee is charged to spectators of the proposed public sporting event, and whether such fee charged is reasonable. (This criterion is designed to test whether a proposed public exhibition of a sport is motivated to support social integration amongst citizens or whether a proposed public exhibition of a sport is singularly pecuniarily motivated.)

This amendment to Local Government Acts might state, simply, that publicly exhibited sporting events licensed by a local authority pursuant to the Act, and in consideration of the number of factors detailed in the Act, is not a public nuisance.

## 2. Promulgate a new statute for each sporting event

Individual statutes already exist to authorise the staging of individual sports events in public, though none of these statutes yet make reference to public nuisances, to public rights which may be said to be impinged upon by the staging of the publicly exhibited sporting events the subject matter of these statutes, or to any circumstances of interference with public rights which may be said to be caused by the sporting event. Such statutes regulate specific sports such as boxing and horseracing, and specific sporting events such as the Australian Grand Prix in Melbourne and the Indycar motor race at the Gold Coast in Queensland. And we may look to present-day statutes of various common law jurisdictions, such as the Boxing and Wrestling Control Act 1986 (NSW); the Racing Administration Act 1998 (NSW); the Racing Act 2002 (Qld); the Horse Racing Act, Revised Statutes of British Columbia 1996, c. 198; the New York Racing, Pari-Mutuel Wagering and Breeding Law c. 47-A,<sup>1172</sup> and sections 18600-18618,<sup>1173</sup> and sections 19420-19421,<sup>1174</sup> of the California Business and Professions Code, for example, for guidance as to the manner in which authority is presently utilised to regulate sport.

The only means by which the use of public streets or highways, or public parks, or public beaches, may be legitimized for sports events is legislation. It has been long established in our law that the Crown cannot alone license a public nuisance. And a local authority or local council likewise lacks such power, even where legislation might grant to them management responsibilities in respect of public roads, public parks and public beaches. Such local authorities, being administrative organs of the State, are in the same position as the Crown and cannot alone license a public nuisance, which is a common law crime.<sup>1175</sup>

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<sup>1172</sup> Section 101 establishes the New York state racing and wagering board in the following terms: “There is hereby created within the executive department the New York state racing and wagering board, which board shall have general jurisdiction over all horse racing activities...”

<sup>1173</sup> Chapter 18600, the Boxing Act, establishes the State Athletic Commission for California, with a board, the members of which are appointed by the Executive and Legislature of the State.

<sup>1174</sup> Sections 19420-19421 establishes the California Horse Racing Board, with members appointed by the Governor of the State of California.

<sup>1175</sup> It has been known since at least the seventeenth century that “none can proscribe to make a common nuisance, for it cannot have a lawful beginning by license or otherwise, being an offence at common law”: *Dewell v Sanders* (1619) Cro Jac 490, 79 ER 419; *Fowler v Sanders* (1617) Cro Jac 446, 79 ER 382. See further the discussion in Chapter 14 of this thesis, and see *Johnson v City of New York* 186 NY 139, 78 NE 715 (1906); *Hill v*



Only Parliament may authorise the commission of what may otherwise amount to a public nuisance crime. And only through legislative edict may the common law be changed.

*Salmond on Torts* notes, in respect of public nuisance: “These principles are as old as any in the common law and can now be altered only by legislation.”<sup>1176</sup> These principles were also noted by the Court of Appeals of New York in *Johnson v City of New York*, where Chief Justice Cullen, speaking for the court, said: “Highways are constructed for public travel, and, as already said, the acts of the defendants [in using the highway for a motorcar race] were doubtless an illegal interference with the rights of the traveller... It is entirely possible that as a matter of fact the plaintiff did not know that the race on the highway was illegal, but it was illegal not from any want of permit, but because there was **no statutory power** to grant a permit to use the highway for a private purpose.”<sup>1177</sup>

Owing to these foregoing principles, when motorcar races are held in the public streets, contemporary State legislatures invariably pass legislation authorising the events. The Motor Racing Events Act 1990 (Qld) is the statute authorising the conduct of the Gold Coast Indy motorcar race about the streets of the city of Gold Coast in Australia. The Act provides, in sections 5G(3) and 12(5), that an activity carried on by or under the direction of the state, or by or with the permission of the sports promoter, within the area for the motorcar race and during the period of time designated for the race does not constitute a nuisance. Section 36 of the Australian Grand Prix Act 1994 (Vic) provides that the Australian Grand Prix, which takes place on the public roads about Albert Park in Melbourne, Australia, does not

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*City of New York* 139 NY 495, 34 NE 1090 at p 1092 (1893); *Attorney-General v Blackpool Corporation* (1907) 71 JP 478. Local authorities lack powers to alter common law rules without a further grant of power from the State. Public nuisance is a common law rule existing to protect and preserve public rights and no local authority may act arbitrarily to remove these public rights from the people without express grant to so do from the supreme legislature. The supreme legislature must use irresistibly clear language in its enabling legislation to ensure that a local authority is sufficiently empowered: see *Bropho v Western Australia* [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18), citing *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; *Ex parte Walsh and Johnson, In re Yeats* [1925] HCA 53, (1925) 37 CLR 36 at p 93; and *Ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 at p 131; *Swan Hill Corporation v Bradbury* [1937] HCA 15, (1937) 56 CLR 746 at p 762 (Dixon J); *R v Greenbaum* [1993] SCC 166, [1993] 1 SCR 674 at pp 687-88 (Iacobucci J) (“Courts must be vigilant in ensuring that municipal governments are not permitted by their enabling legislative enactments to make by-laws which impinge upon civil or common law rights”); *Ex parte Pierson* [1997] UKHL 37, [1998] AC 539 at p 587 (Lord Steyn) (“There is a presumption against a parliamentary intention to infringe upon common law rights and freedoms”); *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ).

<sup>1176</sup> RVF Heuston and RA Buckley *Salmond & Heuston on the Law of Torts* (20<sup>th</sup> edn Sweet & Maxwell London 1992) at p 92.

<sup>1177</sup> 186 NY 139, 78 NE 715, Court of Appeals of New York (1906), at p 147 of the former report. Italics mine.

constitute a nuisance. Section 38 of that Act provides that the Road Safety Act 1986 (Vic) does not apply to the grand prix racing. The use of the word “nuisance” in sections 5G(3) and 12(5) of the Motor Racing Events Act 1990 (Qld), and in section 36 of the Australian Grand Prix Act 1994 (Vic), may be ambiguous in that it is not clear whether the term nuisance includes the specific common law offence of public nuisance in contradistinction to private nuisance such as that created by noise. Given that these statutes deal with the subject matter of motor car racing, a noisesome public sporting activity, and given that the purpose of such legislation is to void a common law rule, and to take away common law public rights, including such public rights as the right to use of the highway and the right to quietude, the use of the general word “nuisance” may not be sufficient to encompass the common law offence of public nuisance. Fundamental rights cannot be overridden by general or ambiguous words.<sup>1178</sup> And there is a juridical presumption **against** a parliamentary intention to infringe upon common law rights and freedoms.<sup>1179</sup> Parliament must use irresistibly clear and unambiguous words in its statutes. The use of the word “nuisance” in the abovementioned motorcar race statutes may not be regarded as irresistibly clear and unambiguous to also encompass the common law offence of public nuisance. Thus an amendment to these Acts, may be required to cover public nuisance as well as private nuisance.

Specific language is appropriate where a change in the common law is the desired result of legislation such as the Motor Racing Events Act 1990 (Qld). A similarly clear and unambiguous provision may be required for each and every sporting event which utilizes the public streets and highways for their competitions, including cycling events, running events or marathons, triathlon races, motorcar races, or cart racing, as well as for events using

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<sup>1178</sup> *R v Secretary of State for the Home Department; Ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 at p 131 (Lord Hoffmann). In *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ) the High Court of Australia referred to “a well established and conservative principle of interpretation that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law.” See also *Benson v Northern Ireland Road Transport Board* (1942) AC 520 at pp 526-527.

<sup>1179</sup> *R v Secretary of State for the Home Department; Ex parte Pierson* [1997] UKHL 37, [1998] AC 539 at p 587 (Lord Steyn). In *Potter v Minaban* [1908] HCA 63, (1908) 7 CLR 277 at p 304 O’Connor J said: “It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.” Aff’d: *Bropho v Western Australia* [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18; *Coco v The Queen* (1994) 179 CLR 427 at pp 436-437; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 at para [11], (2002) 213 CLR 543; and *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ).

beaches and parks such as surfing championships, Ironman championships and surf lifesaving competitions. For each and every public sporting event proposed a statute, expressing clearly and unambiguously that such a public sporting event does not constitute a public nuisance, would be necessary.

Statutes purporting to authorize the use of public places exclusively for major sporting events, such as the Commonwealth Games and the World Swimming Championships, absent specific reference to the common law of public nuisance, are also probably deficient. Legislation of the Victorian Parliament established corporations for the management of the Commonwealth Games and the World Swimming Championships: Commonwealth Games Arrangements Act 2001 (Vic) and World Swimming Championships Act 2004 (Vic). Both Acts, in sections 20-25 and sections 42-50, respectively, provided that various state Acts on environmental law, planning law, and environmental and ecological management, such as the Coastal Management Act 1995 (Vic), did not apply to the development or use of a venue for the respective sports events. But neither Act specifically authorized the use of a public place for a sporting event, which use subsequently infringed upon public rights. Neither Act mentioned the common law, and neither Act authorized the use of public places which might otherwise amount to a public nuisance at common law. The use of public spaces, such as beaches, for sports events, not only raises environmental and conservation issues, but also impacts upon public rights, which must be relinquished for the duration of the use of the public space. Sporting events using public places must be conducted lawfully, according to the rule of law, and not according to the exercise of an arbitrary power by a corporation established under an Act of Parliament. It is incumbent upon Parliament to state expressly, by way of statute, that they prefer a private interest (such as the World Swimming Championships held under the auspices and at the behest of a private association – the Fédération Internationale de Natation) to take precedence over a public right for a limited duration. In the absence of express statutory authorization, public sporting events which utilize public places, or highways, such as beaches, public parks, and public roads, may be challenged as being unlawful as a public nuisance at common law. To remedy this shortcoming, the Commonwealth Games Arrangements Act 2001 (Vic) and World Swimming Championships Act 2004 (Vic), and any future Act of any common law state which purports to enable and promote public sporting events to take place in public places

or public highways, ought to contain a provision which states that the common law of public nuisance does not apply or otherwise states that use of a designated public place or a designated portion of the public highway, for the purposes of the respective public game being staged, is not a public nuisance. A common law public nuisance may be allowed only pursuant to express statutory edict which has the effect of altering the common law.

The promulgation of a new statute for each and every publicly exhibited sports event would be a laborious and contrived mode of regulation. The number of sports events which are exhibited publicly at public spaces (including events such as triathlons, marathons, surf lifesaving championships, surfing events, beach cricket, beach volleyball, acrobatic aeroplane competitions, swimming events, and bicycling events, to name but a few) creates a long list of statutes which would need to be drafted, debated, read, reviewed, voted upon, passed, and promulgated by Parliaments. Whilst a singular formula could be adopted for each statute, thereby ensuring that each separate statute read similarly, the sheer number of statutes required to ensure that each and every publicly exhibited sporting event was lawfully conducted so as to not create a public nuisance through impingement of public rights would create a cumbersome code.

### 3. A statute to cover the field

A general statute that regulates the staging of publicly exhibited sports events would be the most coherent mode to employ. Such statute would provide a consistent application of policy and law across a state's territory.

The objectives of this type of statute might include ensuring that:

- 1) the rights of individual citizens to use of public spaces is not arbitrarily infringed,
- 2) the interests of individual citizens to use of public spaces for their health and recreation are protected,
- 3) publicly exhibited sports events support social integration amongst citizens,
- 4) culturally significant sporting events are protected,

- 5) environmental, economic, social, and moral considerations are taken into account in determining which publicly exhibited sports events receive license.

States could adopt a general statute alike that of the *Code du Sport* of France. The new *Code du Sport* of France which regulates the establishment of sports federations in France, and which establishes penalties for using drugs in sport competitions, also regulates how sports are to be practised at public places.

The principles upon which the French government rely in claiming a regulatory authority over all sport practised in public is detailed in Article L111-2 of the *Code du Sport*. The principles are consistent with the role of the government as *parens patriae*. Article L111-2 provides that the objectives of the government are to develop access to sporting and recreative services and spaces, whilst supporting “collective services of natural and rural spaces”, and supporting social integration amongst citizens.

Pursuant to Article L322-5 the French ministry of sport can close temporarily or permanently a sports establishment or event where the activities of such establishment or where such event presents health risks or where there is risk to physical or moral safety.

Pursuant to Article 331-6 and Regulation R331-6 Section 4: Epreuves et compétitions sportives sur la voie publique of the *Code du Sport, Partie réglementaire – Décrets*, any sport event held partly or entirely on a public highway requires authorization by government and the organizers of such sport event must obtain authorization prior to staging such sport event.<sup>1180</sup> Sanction is given by a prefect of the Department where the sport event is proposed to the staged, or, where more than twenty Departments are involved in the staging of any sport event on public highways, by the Minister of the Interior.<sup>1181</sup> Publicly exhibited

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<sup>1180</sup> The regulation provides: “Article R331-6 Toute épreuve, course ou compétition sportive devant se disputer en totalité ou en partie sur une voie publique ou ouverte à la circulation publique, exige, pour pouvoir se dérouler, l'obtention préalable, par les organisateurs, d'une autorisation administrative délivrée dans les conditions et sous les garanties définies par la présente section.”

<sup>1181</sup> In the political and administrative organization of France there are 100 Departments. A Department, under the French system of government, is roughly the equivalent of a county or shire council or a local government area. Code du Sport Partie réglementaire - Arrêtés Article A331-2 provides: “Article A331-2 Créé par Arrêté du 28 février 2008 - art. (V) L'autorisation prévue à l'article R. 331-6 est délivrée sous réserve des exceptions prévues aux articles A. 331-6 et A. 331-8 : 1° Par le ministre de l'intérieur, lorsque le parcours sur lequel doit se

sport events such as the Tour de France cycling race which make use of public roads must therefore now obtain the license of the Minister of the Interior of France. Comparable tournaments in Australia, such as the Tour Down Under, are not subject to the same level of scrutiny, although they may be a public nuisance at common law because they obstruct the public right of way on the public highway.

Breaching the regulatory framework established under the *Code du Sport* attracts penal penalty, not civil remedies. Pursuant to Article L312-14 the staging of a public sporting event in violation of regulations or in an enclosure not approved in accordance with the statute is punishable by two years imprisonment and a fine of €75,000.00.

The movement toward legislative reform and the establishment of consolidated laws for public exhibitions of sport is, however, not confined to France. Recent legislative enactments of the Parliaments of the Australian states of New South Wales and of Victoria consolidate into one Act, respectively, the laws relating to major events and to venues used for such events and create a legislative framework for the authorization of the use of public venues and public spaces such as roads for sporting events that are declared to be major sporting events.<sup>1182</sup> Also included within the framework are comprehensive rules on advertising, aerial advertising, the use of airspace at events, ticketing and commercial aspects such as the use of logos at major sporting events.

Though these enactments of New South Wales and of Victoria are limited in their scope in that they only create a legislative regime for the conduct and management of sporting events declared to be a “major sporting event”, they provide a very good first step toward the establishment of a comprehensive and uniform sports code and support the argument of this thesis that public exhibitions of sport are a special category of human activity that depend upon sanction from Parliament for legitimacy. In respect of the New South Wales Major

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dérouler l'épreuve inclut des voies situées dans plus de vingt départements distincts ; 2° En vertu d'une délégation ministérielle permanente, par le préfet du département dans lequel le départ de l'épreuve est donné, si le nombre des départements intéressés par la manifestation est égal ou inférieur à vingt. Dans le cas où l'épreuve comporte des points de départ différents, sans que le nombre des départements respectivement traversés soit au total supérieur à vingt, l'autorisation est délivrée par le préfet du département où est établi le siège du groupement organisateur de l'épreuve.

<sup>1182</sup> See Major Events Act 2009 (NSW) and Major Sporting Events Act 2009 (Vic).

Events Act 2009, it is worth noting that only one publicly exhibited sporting event has been authorized under the Major Events Regulation 2010 in New South Wales – the Sydney International FIFA Fan Fest. Under the Victoria legislation, the Major Sporting Events Act 2009, the term “major sporting event” is defined pursuant to section 3 to include sporting events such as the Australian Tennis Open, the Australian Grand Prix, and the Australian Rules Football Grand Final, and analogous events. Further, the Victoria Act defines “sports event”, under section 3 of the Act, to mean:

- “(a) a type of match, game or other event; or
  - (b) a series of matches, games or other events; or
  - (c) a tournament,
- involving the playing of sport (whether or not for competition) at a ground or other place (whether indoors or outdoors) to which persons are admitted on payment of a fee or charge, or after making a donation, to view the playing of the sport or to enter or remain at the ground or place and, in the case of sports event that consists of a series of matches, games or other events or a tournament, includes any opening or closing ceremonies connected with the series or tournament.”

Excluded from this definition are sports events staged at public places such as beaches and parks and roads at which members of the public spectate without paying any fee to so do, including triathlon events, surfing events and surf-lifesaving tournaments. The many public sporting events that take place at beaches and parks and on roads are not covered by the legislation.

The objectives of these major sporting events Acts are varied. In respect of the Major Events Act 2009 of New South Wales the objectives of the Act include:

- (a) to attract, support and facilitate the holding and conduct of major events in New South Wales, in particular, events that are anticipated to be of a large scale with a significant number of participants or spectators (whether of a sporting, cultural or other nature),
- (b) to increase the benefits flowing from major events to the people of New South Wales,

- (c) to promote the safety and enjoyment of participants and spectators at major events,
- (d) to prevent unauthorised commercial exploitation of major events at the expense of event organisers and sponsors,
- (e) to enable authorities that are to manage, co-ordinate or regulate major events to be established or designated by regulation,
- (f) to make provision for the following matters in relation to major events:
  - (i) traffic control and the co-ordination of transport and parking,
  - (ii) the regulation of commercial exploitation of the events, including the prevention of ambush marketing and unauthorised use of official titles and insignia,
  - (iii) safety and crowd management,
- (g) to ensure that government agencies are authorised to facilitate and support the holding and conduct of major events.”

The New South Wales Act,<sup>1183</sup> and Victoria Act,<sup>1184</sup> each establish that an event may only be declared to be a major sporting event where such event is at an international, national or State level and it is in the public interest to so declare. The New South Wales Act establishes that the declaration must be made by way of regulation on the recommendation of the responsible Minister.<sup>1185</sup> The Victoria Act establishes that the Governor in Council may make an order that an event is a major sporting event on the recommendation of the responsible Minister.<sup>1186</sup> In making a regulation under the New South Wales Act or an order under the Victoria Act, the responsible Ministers must have regard to and assess:

- (a) the size of the event,
- (b) the likely number of spectators for the event,
- (c) the likely media coverage of the event,
- (d) the projected economic impact of the event,

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<sup>1183</sup> Section 5(1) Major Events Act 2009 (NSW).

<sup>1184</sup> Section 9(1) Major Sporting Events Act 2009 (Vic).

<sup>1185</sup> Section 5(1) Major Events Act 2009 (NSW).

<sup>1186</sup> Section 7 Major Sporting Events Act 2009 (Vic).



- (e) the potential contribution to New South Wales's or Victoria's international profile as a host of major events,
- (f) the commercial arrangements for the event,
- (g) the views of the event organiser, including the organiser's event management experience and expertise,
- (h) factors affecting the operational organisation of the event, such as the following:
  - (i) preparation of road and transport management plans,
  - (ii) emergency management plans,
  - (iii) security plans and consultation with police and emergency services, and
- (i) the views of local councils directly affected by the event in relation to the arrangements made or to be made for the event.<sup>1187</sup>

The responsible Ministers do not have to consider the impact of the major event on common law public rights such as the right to quietude, the right of way on the highway, the public right to health, or the right to recreation at the place where the event is proposed to be staged, for example, in determining whether to recommend that a regulation or order be made declaring a proposed event to be a major sporting event. Whether the common law public right to safety is taken into consideration in determining whether a proposed public sporting event is to receive license by virtue of the duty on the responsible Minister to assess emergency management plans and security plans for a proposed major sporting event is debatable. But, at the least, both enactments require the Minister to assess emergency management plans, security plans, and to consult with police and emergency services.<sup>1188</sup> In this respect, both enactments are a positive step toward a comprehensive and balanced code. Perceptible in the list of factors which the responsible Ministers must assess prior to recommending the making of a regulation or order declaring a major sporting event is the *parens patriae* duty of the Crown.

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<sup>1187</sup> Section 5(3) Major Events Act 2009 (NSW); section 9(2) Major Sporting Events Act 2009 (Vic).

<sup>1188</sup> Section 5(3) Major Events Act 2009 (NSW); section 9(2) Major Sporting Events Act 2009 (Vic).

Both Acts also promulgate rules on the establishment and administration of major events authorities to manage and conduct a major sporting event; rules on the obligations and powers of government agencies in respect of major events; and rules on the management of road and traffic areas in concert with Commissioners of Police. Along with the declaration of an event as a major sporting event, pursuant to regulation under the New South Wales Act, the regulation must designate either a major event authority or a government agency or a public official as the “responsible authority” for the conduct of the major event.<sup>1189</sup> In establishing a uniform sports code throughout common law jurisdictions, parliamentary responsibility, and *parens patriae* duty, in respect of a publicly exhibited sporting event could be ensured in a fashion alike that established under section 9(2) of the New South Wales Act, whereby a major event authority established for the purposes of managing and conducting a major sporting event is subject to the control and direction of the responsible Minister in the exercise of its functions.<sup>1190</sup>

Both the New South Wales and Victoria major sporting events Acts empower the responsible Minister to temporarily close a road or part of a road where a road may be used for the preparation for or for conducting a major sporting event.<sup>1191</sup> The Acts exclude from operation extant road safety and road management Acts,<sup>1192</sup> and establish a duty on the part of the responsible Minister to consult with the roads authority and local government.<sup>1193</sup> The Acts also penalize persons for using a road or a part of a road which is in use for the preparation for or conduct of a major sporting event.<sup>1194</sup> There is no duty on the responsible Minister to consider the impact of the temporary closure of a road or a part of a road on the common law public right of way on the highway in the New South Wales Act nor in the Victoria Act; though the New South Wales Act establishes a duty, on the part of the responsible authority managing the major sporting event to ensure that a road is not closed

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<sup>1189</sup> Section 8 Major Events Act (NSW).

<sup>1190</sup> Section 9(2) Major Events Act 2009 (NSW).

<sup>1191</sup> Sections 26-29 Major Events Act 2009 (NSW); and sections 108-113 Major Sporting Events Act 2009 (Vic).

<sup>1192</sup> The major events Acts also exclude the operation of the Road Safety Acts and Road Rules from operation in respect of major sporting events – see section 22(4) of the Major Events Act 2009 (NSW) respecting Road Transport (General) Act 2005 (NSW), and section 113 of the Major Sporting Events Act (Vic) respecting Road Safety Act 1986 (Vic).

<sup>1193</sup> Sections 109, 110 Major Sporting Events Act 2009 (Vic).

<sup>1194</sup> See section 24 of the Major Events Act (NSW), establishing a penalty of 20 penalty units, and see section 30 of the Major Events Act (NSW) establishing a penalty of 30 penalty units, and see sections 105-108 of the Major Sporting Events Act (Vic) establishing a penalty of 20 penalty units.

for a period longer than is necessary to serve the purpose for which the road is closed. The duty imposed on the responsible Minister to take into consideration road and transport plans for the proposed major sporting event in determining whether to recommend a license to a major sporting event may be sufficient consideration of the common law public right to use of the highway. But a uniform and balanced sports code ought to require, in clear and unambiguous terms, the Minister to account for the common law public right of use of the highway in determining whether to recommend whether a sporting event receive a license for public exhibition.

In establishing a uniform sports code in respect of all public exhibitions of sport, the public right to safety could be protected in a fashion similar to the safety and crowd management provisions of both the New South Wales and Victoria Acts. These Acts contain penal sanctions for any person at a major sporting event who possesses a weapon, a lit distress signal or fireworks, a laser pointer, dangerous goods, an animal, a horn or bugle or whistle or loud hailer, or a flag larger than one metre square, or who throws any bottle, stone or projectile.<sup>1195</sup> A person must not disrupt a match, game, sport or event without reasonable excuse,<sup>1196</sup> nor may a person damage or deface any building, fence, barrier, barricade, seat, chair, table, structure, vehicle, craft, truck, pipe, tap, tap fitting, conduit, electrical equipment, wiring or sign, nor damage any trees, plants or other flora within an event venue or event area at a major sporting event.<sup>1197</sup> The Victoria Act also prohibits persons from climbing on any fence barrier or barricade or any roof or parapet of a building within an event venue or event area; and also prohibits persons from deliberately obstructing the view of any other person.<sup>1198</sup> And section 44(1) of the New South Wales Act provides that a person must not use indecent, obscene or threatening language, behave in an offensive or indecent manner, cause serious alarm or affront to a person by disorderly conduct, or obstruct a person in the performance of the person's work or duties.<sup>1199</sup>

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<sup>1195</sup> See sections 62-68 of the Major Sporting Events Act 2009 (Vic); and sections 41(1) and 43(4) and (7) of the Major Events Act 2009 (NSW).

<sup>1196</sup> Section 67 of the Major Sporting Events Act (Vic) imposes a penalty of 60 penalty units.

<sup>1197</sup> Sections 69 and 70 of the Major Sporting Events Act 2009 (Vic) imposes a penalty of 20 penalty units.

<sup>1198</sup> Sections 72, 73 and 74 of the Major Sporting Events Act (Vic) imposes a penalty of 10 pen units.

<sup>1199</sup> Section 44(1) of the Major Events Act 2009 (NSW) imposes a penalty of 10 pen units.

Both the New South Wales and Victoria major sporting events Acts contain provisions empowering a major sporting event authority and the police to respond to persons disrupting or interrupting any sport event or engaging in behaviour which is a risk to the safety of persons at a sporting event or endangering the person or another person at a sporting event.<sup>1200</sup> Such persons may be directed to leave and not re-enter a sports venue or event area. If a person appears to be intoxicated or using indecent, obscene or threatening language or behaving in an offensive or indecent manner they may be directed to leave and not re-enter a sports venue or event area.

These several penal sanctions on spectators and others at a major sporting event or at a sports venue or event area are analogous in their scope to those penalties imposed upon the retinue at tournaments in the middle ages pursuant to the *Statuta Armorum* of Edward I in 1292.<sup>1201</sup> Furthermore, the sanctions against those persons possessing weapons or projectiles or acting disruptively at a sporting event, under the New South Wales and Victoria Major Events Acts, may be seen as an appropriate mechanism to protect the common law public right to safety at a publicly exhibited sporting event, thereby obviating the need to have recourse to the common law remedies under a public nuisance suit.

Whilst these major sporting events enactments of New South Wales and of Victoria provide some degree of consideration for the impact of publicly exhibited sporting events on the common law public right of safety, an informed and balanced code of sport would also

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<sup>1200</sup> Pursuant to section 83 of the Major Sporting Events Act 2009 (Vic), a person who is believed on reasonable grounds to be a person who has committed an offence under the Act may be directed to leave and not re-enter a sports venue or event area. Further, pursuant to section 84, a person may be directed to leave and not re-enter a sports venue or event area if the person is:

- (a) disrupting or interrupting any match, game, sport or event organised by the event organiser; or
  - (b) the person is engaging in conduct which is a risk to the safety of that person or other spectators;
- or
- (c) the person is causing unreasonable disruption or unreasonable interference to spectators of the event or persons engaged in the conduct or management of the event or event venue.

Pursuant to section 46(4) of the Major Events Act 2009 of New South Wales, a person may be directed to leave a major sporting venue where the person is causing a significant disruption or inconvenience or behaving in an offensive manner or in a manner likely to endanger the person or another person or is otherwise contravening a provision of the Act or a regulation. Section 43(1)(e) of the Major Events Act 2009 (NSW) provides that a person may be prohibited from entering a major event venue or facility or any part of a major event venue or facility:

- (i) if they are in possession of any prohibited thing, or
- (ii) if, in the opinion of a person authorised by the responsible authority, they are or appear to be intoxicated.

<sup>1201</sup> See n 56 and accompanying text in Chapter 2, above.

require the Executive to consider the impact of a proposed publicly exhibited sporting event on other common law public rights such as the right to quietude, the right to use of the highway, and the right to recreation at public places such as public beaches and parks, as well as the impact on the environment, and the impact on the health of participants in and spectators at sporting events, in determining whether to recommend the staging of a publicly exhibited sporting event. Missing from these New South Wales and Victoria Acts are provisions in respect of the public right to health at sporting events, in particular. Both players and spectators at sporting events ought to have need to be protected from the harm which can be caused by weather, particularly in circumstances where summer sporting events are staged on very hot summer days with much exposure to the sun and very hot temperatures posing health risks for players and spectators alike.

The New South Wales and Victoria Major Sporting Events enactments inadequately protect common law public rights such as the public right to quietude or the public right to recreation, there being no reference to the need for the Executive to take into account the impact of the staging of a major sporting event on the public rights of the community wherein such major sporting event is proposed to be staged. Under section 25 of the Major Sporting Events Act 2009 (Vic), the Minister may make guidelines in relation to minimum event planning standards for event organisers of major sporting events including, but not limited to— (a) traffic and transport management; (b) emergency management; (c) environmental impact management; and (d) event security. But there is no duty on the responsible Minister to account for the impact of a publicly exhibited sporting event on the public right to quietude or the public right to health and safety. These considerations must be included in any legislative reform. The Major Events Act 2009 of New South Wales not only fails to protect common law public rights or to minimize harm to the public in the exercise of their public rights during the staging of a major event at a public place, but in fact a person is not liable at all, under sections 51(6) and 53(3) for “...(c) the emission of noise, including permissible noise levels, on or from the land, or (d) activities that affect the amenity of the locality, by the doing of anything that is reasonably necessary to be done by or under, or as a consequence of the operation of, this Act, that is reasonably necessary to be done in order to comply with or give effect to a policy, strategy or plan prepared and

implemented by the responsible authority for the purposes of this Act...” Furthermore, pursuant to section 61 of that Act, there is no liability in nuisance:

“Anything done or omitted to be done by any person:

(a) in the exercise of functions under this Act or the regulations (including functions which, by this Act, are taken to be functions under another Act or instrument), or

(b) pursuant to any of the provisions of this Act or the regulations (including provisions which, by this Act, are taken to be provisions of another Act or instrument),

does not constitute a nuisance.”

The question remains as to whether section 61 of the New South Wales Major Events Act 2009 would be interpreted strictly and narrowly, following the decisions in *Potter v Minahan* and *R v Secretary of State for the Home Department; Ex parte Pierson*, because this section may be interpreted broadly as seeking to take away from the people a means for enforcing a common law public right, namely a suit at common law for public nuisance.<sup>1202</sup> There is a presumption against a parliamentary intention to infringe upon fundamental rights and freedoms at common law. The people ought not be left without recourse to a remedy or an appeal mechanism against a recommendation to grant a license to a major sporting event if their public rights are unreasonably impinged upon. Recourse to judicial review of the Ministerial decision to recommend a regulation declaring a major sporting event may not be an adequate remedy. In establishing a uniform sports code, provisions ought to be established to adequately protect public rights. And consideration must also be had as to

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<sup>1202</sup> *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304; *R v Secretary of State for the Home Department; Ex parte Pierson* [1997] UKHL 37, [1998] AC 539 at p 587 (Lord Steyn). In *Potter v Minahan*, O'Connor J said: ‘It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.’ *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277 at p 304. Aff’d: *Bropho v Western Australia* [1990] HCA 24 at para [13], (1990) 171 CLR 1 at p 18; *Coco v The Queen* (1994) 179 CLR 427 at pp 436-437; *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ). In *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14 at para [27]-[29], 204 CLR 290 at pp 298-99 McHugh J noted that: “Courts have long held that a statute should not be construed as amending fundamental principles, infringing common law rights or departing from the general system of law unless it does so with ‘irresistible clearness’. The legislative intention to do so, it is often said, must be ‘unambiguously clear.’” In *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4 at para [47] (French CJ) referred to “a well established and conservative principle of interpretation that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law.”

establishing a legal mechanism for adequately resolving disputes between sports organization wishing to stage and promote their sport and the public exercising their public right to quietude, use of the highway or public right to recreation.

Given that common law public nuisance is a real concern affecting the legitimacy of publicly exhibited sporting events in common law jurisdictions, the establishment of a broad regulatory framework alike that of France's *Code du Sport*, and incorporating some of the elements of the Major Events Act 2009 of New South Wales and the Major Sporting Events Act 2009 of Victoria, would effectively protect public rights. Culturally important public sporting events can also be protected. Any harm that might flow from the unregulated staging of public sporting events can be minimized. Such a statute addresses the fundamental issue that public rights and public sporting events are discordant. Should a general statute be the preferred solution, five essential elements are necessary in ensuring an effective regulatory framework. First, the statute would need to establish a licensing system, as was first promulgated by Richard I in the year 1194 and similarly to that promulgated by France's *Code du Sport*. This statute would mandate that any sporting event proposed to be staged at a public place, such as a road, a beach or a park, and any sporting event to which crowds of spectators may be drawn, must be approved by the Minister for Sport.

Second, when granting or refusing approval to a proposed public sporting event, the Minister for Sport would be required to consider a number of factors to redress the incompatibility of public rights and public exhibitions of sport. At least eight factors ought to be addressed by the Minister in determining whether to grant or refuse a license:

- 1) whether public rights are impinged by the staging of the proposed sporting event, and if so, whether the promoters of the proposed sporting event have taken or propose to take steps to minimize harm to public rights;
- 2) whether the proposed sporting event is of cultural significance, accruing cultural and social benefits to local residents at the place where the proposed sporting event is to be staged;
- 3) whether the proposed public sporting event unreasonably impinges on recreative pursuits at the place where the proposed event is to be staged

- 4) the degree of violence occurring in the sporting event proposed to be staged in public, with the objective that displays of violence are to be minimized as much as possible;
- 5) the environmental impacts of the proposed sporting event;
- 6) the economic impacts of the proposed sporting event;
- 7) diversity, and whether the proposed sporting event contributes to or detracts from a diverse practice of sports in the local area where the public sporting event is proposed to take place;
- 8) whether a fee is charged to spectators of the proposed public sporting event, and whether such fee charged is reasonable. (This criterion is designed to test whether a proposed public exhibition of a sport is motivated to support social integration amongst citizens or whether a proposed public exhibition of a sport is singularly pecuniarily motivated.)

Ultimately, the task for the Minister is to balance the need to protect and support public rights on the one hand whilst protecting and supporting culturally and socially beneficial public sporting events on the other.

Third, the statute would need to provide that a sporting event for which approval has been granted does not constitute a public nuisance.

Fourth, the statute would need to provide appeal mechanisms against a decision to grant a license where members of the public believe that their public rights are unreasonably impinged upon by the granting of the license to stage the public exhibition of sport.

Fifth, the statute would need to establish penalties for individuals and for sporting associations who promote, finance, stage, or assist in the staging of, a sporting event at a public place, or a sporting event to which spectators attended or were invited to attend, without a license or in contravention of the Act. A sanction of two years imprisonment and a fine of the equivalent of a €75,000.00 value, as is mandated under the French *Code du Sport*, would appear to be an appropriate deterrent.



It is recommended that, in order to avoid risks of corruption, and in order to minimize the potential financial influence of sporting associations over local government officials, a statute should establish a centralized source of power rather than to allow a dual regulatory framework as is established in France pursuant to the French *Code du Sport*. A Minister of Sport, supported by his government department and his public servants, and being accountable to the other members of Cabinet and to Parliament, would be the most appropriate person to grant or refuse approval of licenses for proposed publicly exhibited sporting events. This framework would avoid local governments jockeying against each other for prized public sporting events. Should local governments have authority to license publicly exhibited sports events there is a risk that financially wealthy sporting associations would exercise a degree of control over local government officials. Were local governments to exercise control, the rules and framework under which a license is to be granted or refused could be unreasonably compromised, leading to detriment of public rights and to loss of diversity in the practice of sport.

Where the regulatory framework is administered by a central authority there is a greater likelihood that the *parens patriae* responsibility of government will be applied, that diversity in sports practice will be enhanced, and that public rights will be protected. Provided that a new legislative framework to license public exhibitions of sport is appropriately phrased, there ought to be little danger in according the Crown responsibility to administer this new legislative framework. It is a basic rule of constitutional law that the organs of government must themselves operate through law.<sup>1203</sup> The ministers of the Crown are responsible to parliament and to the populace that elected them.<sup>1204</sup> For every exercise of Crown power some minister is answerable.<sup>1205</sup> There is no reason to doubt that the Crown would sanction a very wide variety of public exhibitions of sports for the public good.

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<sup>1203</sup> See ECS Wade and AW Bradley *Constitutional and Administrative Law* (Longman London 1992) at p 98.

<sup>1204</sup> See Wade and Bradley (ibid) at chapters 7 and 14.

<sup>1205</sup> Sir William R Anson *The Law and Custom of the Constitution* (Clarendon Press Oxford 1908) vol II, pt 1, at pp 62-72. Maitland argues that the practice, in medieval times, by which the royal will had to be signified in documents bearing a royal seal, such seal being applied by one of the king's ministers, is the foundation of our modern doctrine of ministerial responsibility. See FW Maitland *The Constitutional History of England* (Cambridge University Press Cambridge 1965) at pp 202-203.

#### 4. Concluding remarks

Only by the foregoing statutory means may the conflict between public rights and public sporting events be resolved. Absent legislative authority, public exhibitions of sport conducted by individuals, corporations, or sports associations, at public places such as roads, beaches and parks, will continue to be harmful activities in that they have capacity to harm public rights and create public nuisances.

## **Part 5   Conclusion**

## Chapter 17

### Conclusion

In *Bank of New Zealand v Greenwood* Justice Hardie Boys noted: "...[N]uisance is one of those areas of the law where the courts have long been engaged in the application of certain basic legal concepts to a never-ending variety of circumstances; and that will continue to be so, for by its very nature the law of nuisance is intimately involved with the developing use of the environment, both natural and manmade, in which we all live."<sup>1206</sup>

A high level of intellectual curiosity and an open-minded appreciation of the nuances of common law rules, and particularly common law public nuisance, are the motivations for this thesis' arguments. This thesis has proved that publicly exhibited sporting events may create common law public nuisances by impinging on public rights. The public rights that might be impinged by the staging of a sporting event at a public place include the public right of way, the public right to quietude, the public right to safety, the public right to life, and the public right to recreation. Public sporting events may impinge upon public rights directly, such as where the competitors in a public sporting event use a highway or a beach or park, or the foreshore or the sea, themselves and thus obstruct or interfere with the public's right to use of those places. Or public sporting events may impinge upon public rights indirectly, such as where the event draws together a crowd of spectators which crowd obstructs or interferes with public rights to use of public places, or where a crowd causes discomfort to the public in the exercise of a public right to quietude or safety. Any license given to sporting event promoters purportedly authorizing them to stage their sporting event at a public place, whether given by a local government authority, or by the Crown, is spurious at law and is ineffectual. Neither the Crown nor a local authority can license a

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<sup>1206</sup> [1984] 1 NZLR 525 at p 530.

public nuisance. Neither has power devolved to them from the supreme legislature under a statute to alter the common law by their purported license.

Our beachgoing family, that family innocently enjoying their recreation, depicted in the opening of this thesis, possesses lawful common law rights superior to those of a promoter or organizer of a publicly exhibited sporting event in possession of a license, which it is argued is inadequate authorisation. Their right to use of the beach and public parks, for their recreation and enjoyment, may not be displaced by any body except Parliament, and only pursuant to the promulgation of legislation taking away from them their common law public rights.

Part One of the thesis argued that public rights are extant at all public places where the public make use of such public place ‘as of right’. Public rights exist at parks, beaches, village and town greens and commons, as well as at more conventionally recognized places such as highways, the foreshore and the sea. In Part Two of this thesis, the particulars of the common law offence of public nuisance was set out in some considerable detail. This methodology was chosen in order to forestall any possible prejudice which might have been held against the use of public nuisance in the assessment of the lawfulness of public exhibitions of sport. Part Three of the thesis detailed sports-related public nuisance precedents. These precedents explained the factual circumstances of sports-related public nuisances and provided explanation for the many ways in which a publicly exhibited sporting event might create a common law public nuisance. The outcome of the detailed analysis of precedents and jurisprudential commentary, in these first three parts of this thesis, is that the public possess a public right of way on the highway, a public right of quietude, a public right of safety, a public right to life, a public right to navigation, a public right to fishing, and a public right to recreation, each of which may be infringed by the staging of a sporting event at a public place such as a highway, a beach, or a park. These public rights, identifiable through the lens of public nuisance precedents, are fundamental common law rights which may not be abrogated but by clear and unambiguous words in legislative enactment. Part Four of this thesis assessed the role of the Crown and of local authorities in respect of public sporting events. In this final part the common law doctrines of parliamentary sovereignty and *parens patriae*, and the principles of statutory interpretation, compounded to reveal the

logical conclusions that the Crown has a critical role in protecting public rights against the actions of publicly organized sport and that the Crown must turn to Parliament to ask for new laws in balancing the competing interests of the public and of the promoters of organized sport. The Crown must not promote public exhibitions of sport which create public nuisances by impinging upon public rights and must, instead, turn to Parliament to ask for new laws to authorise the Crown to promote public exhibitions of sport.

These findings dictate that a new legislative regime ought to be established to protect public rights on the one hand, and to safeguard culturally significant publicly exhibited sporting events by ensuring they are lawfully conducted, on the other. The promulgation of a new statutory regime licensing publicly exhibited sports events, is the remedy most advantageous for society and for the proper regulation of the use of public spaces. This remedy enables society, through its representatives in the Executive of government, to allow or disallow those sports that are, respectively, laudable or offensive to them. In this way society can control the permissible levels of violence inherent in sports and the permissible levels of use of sparse public space, rather than have incremental concentrations of repugnant violence and incessant augmentation of public sporting activity, accented by television and radio mediums, forced upon them, in an aggrandized fashion, by overeager athletes and acquisitive sports corporations or federations.

Public competitions of sports and games are not to be staged in public according to whatever standards and mores may be appealing to the players, or to the promoters and managers, of those sports and games. The role of the common law in regard to public exhibitions of sport is to reinforce the norms and mores of the people, as a whole. These norms and mores are designated as common law public rights under public nuisance jurisprudence. The use of public spaces for recreative and sporting practices is a public right of all people in a society. The public ought not to tolerate the unabated and wanton display of public sporting contests absent maintaining some measure of control over *which* public sports are appropriate for the society wherein a sport is practised and *how* such public sports are played.

There is a very real danger, as was known to the Crown and to the Parliaments of previous centuries, that sport is disposed to gratuitous cruelty, to the corruption of the communal ethic, and to the disturbance of peaceable people spending their time in quietude or in healthful recreation at public spaces, often for the sake of profit. Today, the dangers remain, yet are exacerbated; there being today a very real need to check an aggrandizement of violence in sport and an incessant desire to make money from public exhibitions of sporting contests where such aggrandizement or desire impinges upon public rights. The common law offence of public nuisance is a barometer with which we may logically and commendably measure the degree to which, and the means by which, publicly exhibited sporting competitions harm the public in the exercise of their public rights. The idea that public sports ought to obtain communal sanction through Parliament balances the excessiveness and overindulgence to which public sports are prone with the vast cultural, social and economic benefits that accrue in the staging of public cultural pursuits. We need only look to historical regulation to see that governmental action can benefit the public practice of sport. The original Royal Proclamation of Richard I in the year 1194,<sup>1207</sup> whilst noting that tournaments were a sport engendering harm, nonetheless allowed the sport to be practised publicly in England because the benefits accruing to the state through the promotion of virtue, gallantry and chivalrous conduct in the knights of the realm outweighed the inherent dangerousness and iniquity of the sport, provided, however, that any such practice be confined and regulated so as to safeguard rights and protect the peace. So too, for our tournaments today.

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<sup>1207</sup> See the Proclamation on Tournaments of Richard I dated 20<sup>th</sup> August 1194: *Foedera* vol i, at p 65; W Stubbs (ed) *Hoveden: Chronica magistri* (Longman London 1868-1871) vol iii, at p 268; and R Howlett (ed) *Chronicles of the reigns of Stephen, Henry II, and Richard I, edited from the manuscripts* (Longman London 1884-1889) vol ii, ch IV at p 422.

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